

## **EXHIBIT 24**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
)  
)  
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) February 19, 2020  
) 9:30 a.m.  
Debtor. )  
) MOTIONS  
)  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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1 DALLAS, TEXAS - FEBRUARY 19, 2020 - 9:43 A.M.

2 THE COURT: All right. Well, we have Highland  
3 matters. Let's get lawyer appearances, in the courtroom  
4 first.

5 MR. DEMO: Good morning, Your Honor. Greg Demo;  
6 Pachulski Stang Ziehl & Jones, on behalf of the Debtor. With  
7 me are Jeff Pomerantz and John Morris.

8 THE COURT: Okay. Good morning.

9 MR. POMERANTZ: Good morning.

10 MR. CLEMENTE: Good morning, Your Honor. Matthew  
11 Clemente and Juliana Hoffman from Sidley Austin on behalf of  
12 the Official Committee of Unsecured Creditors.

13 THE COURT: Good morning.

14 MS. HAYWARD: Good morning, Your Honor. Melissa  
15 Hayward and Zachery Annable also on behalf of the Debtor.

16 THE COURT: Good morning.

17 MS. LAMBERT: Lisa Lambert with the U.S. Department  
18 of Justice on behalf of the U.S. Trustee, William Neary.

19 THE COURT: Good morning.

20 MS. PATEL: Good morning, Your Honor. Rakhee Patel,  
21 Phil Lamberson, and Annemarie Chiarello of Winstead, P.C., and  
22 also Brian Shaw of Rogge Dunn Group, on behalf of Acis Capital  
23 Management, LP and Acis Capital Management, GP, LLC.

24 THE COURT: Thank you.

25 MR. PLATT: Good morning, Your Honor. Mark Platt

1 from Frost Brown Todd on behalf of the Redeemer Committee of  
2 the Highland Crusader Fund. I believe that at least Marc  
3 Hankin from Jenner & Block is on the line as well.

4 THE COURT: Okay. Thank you.

5 MS. ANDERSON: Good morning, Your Honor. Amy  
6 Anderson with Jones Walker on behalf of the Issuers. And I  
7 believe Mr. James Bentley with Schulte Roth is also on the  
8 phone.

9 And I apologize for interrupting the flow. I would ask if  
10 Mr. Bentley and I could be excused after the uncontested  
11 matters are taken up this morning, just to avoid --

12 THE COURT: Okay.

13 MS. ANDERSON: -- having us -- I don't want to re-  
14 interrupt later, if that is all right with Your Honor.

15 THE COURT: Okay. That's fine. Thank you.

16 MS. ANDERSON: Okay.

17 THE COURT: All right. That looks like all the  
18 courtroom appearances. On the phone, we heard that James  
19 Bentley is there. Do you want to appear, Mr. Bentley?

20 MR. BENTLEY: Yes, that's correct, Your Honor. Good  
21 morning.

22 THE COURT: All right.

23 MR. BENTLEY: Good morning, Your Honor. James  
24 Bentley; Schulte Roth & Zabel; for the Cayman Issuers.

25 THE COURT: All right. And someone else was there

1 for the Redeemer Fund. I can't remember. Was it Mr. Clubok  
2 you said, or anyone else on the phone?

3 MR. HANKIN: Marc Hankin from Jenner & Block, --

4 THE COURT: Oh, okay.

5 MR. HANKIN: -- Your Honor.

6 THE COURT: All right. Mr. Hankin. Anyone else on  
7 the phone who wants to appear may go ahead.

8 All right. I guess we're good to go. Well, I'll turn now  
9 -- Mr. Demo, are you going to start us off today?

10 MR. DEMO: Yes, Your Honor.

11 THE COURT: Someone delivered a wonderful notebook  
12 and an easy-to-follow agenda. I appreciate whoseever hard work  
13 was behind that. It really helps us get prepared back in  
14 chambers. So, thank you.

15 MR. DEMO: And we're happy to do it, Your Honor,  
16 because, honestly, it helps us, I think, as much as it helps  
17 you.

18 THE COURT: Okay.

19 MR. DEMO: And we do have extra copies if anybody  
20 needs a copy of the agenda.

21 THE COURT: Okay.

22 MR. DEMO: Generally speaking, we'd kind of like to  
23 go in the order of the agenda, I think, with two exceptions.  
24 I know that Ms. Adams and Mr. Bentley have to move, so I  
25 thought maybe we could do their objection to the settlement

1 motion first.

2 THE COURT: Okay. So that's the carryover matter.

3 MR. DEMO: Correct, Your Honor.

4 THE COURT: We obviously have an order in place, but  
5 we kept it open to accommodate their issues.

6 MR. DEMO: Correct.

7 THE COURT: Okay.

8 MR. DEMO: And that's Item 7 on Page 7.

9 THE COURT: All right.

10 MR. DEMO: And I think this one -- and anybody can  
11 correct if I'm wrong -- will go pretty easily. We've come to  
12 an agreement with the Objecting Parties.

13 THE COURT: All right.

14 MR. DEMO: We are planning on submitting, under a  
15 notice, a revised copy of the operating protocols that were  
16 approved by this Court in connection with the settlement that  
17 addresses those Objectors' concerns. And then once that is  
18 filed, the Objecting Parties will withdraw their objection.

19 THE COURT: All right. Anyone wish to speak up on  
20 this matter?

21 All right. Well, as I recall, the concern had been that  
22 they didn't want the agreed-upon operating protocols with the  
23 Committee to somehow change contractual rights of the parties,  
24 and so --

25 MR. DEMO: That is correct, Your Honor. And we took



1 their language and we carved out a small universe of CLO  
2 Issuers, --

3 THE COURT: Okay.

4 MR. DEMO: -- exactly as they asked for.

5 THE COURT: All right. Well, again, I'll ask: Does  
6 anyone have any comment about this revised process?

7 All right. Well, that sounds perfectly fine to me, so  
8 we'll look for the revised copy of the operational procedures.

9 MR. DEMO: Okay. Great, Your Honor.

10 And then I guess the only other exception to the order of  
11 the agenda --

12 (Garbled phone noises.)

13 THE COURT: Is someone on the phone wishing to speak  
14 up? (no response) All right. I guess not.

15 MR. DEMO: Yeah. I guess the only other exception to  
16 the order in the agenda is the Foley Gardere retention  
17 application.

18 THE COURT: Okay.

19 MR. DEMO: We would like to do that last. It is a  
20 contested hearing and I think we are going to have some  
21 evidence on that.

22 THE COURT: All right. All right. Sounds fine.

23 MR. DEMO: Then, I guess, just going through the  
24 agenda in the order that it's written, the first one is the  
25 Lynn Pinker retention application. We had originally filed

1 that retention application back in October. We recently  
2 withdrew it. We're not going to go forward on it.

3 THE COURT: All right.

4 MR. DEMO: The second matter, and I guess the second  
5 two matters, hopefully, we can take at the same time. These  
6 are two uncontested matters. Certificates of no objection  
7 have been filed for both of them. The first is the foreign  
8 representative motion.

9 THE COURT: Yeah, and I will tell you, I don't know  
10 if it's shown up on PACER yet, --

11 MR. DEMO: Okay.

12 THE COURT: -- but I actually already signed an order  
13 on that, --

14 MR. DEMO: Okay.

15 THE COURT: -- as well as exclusivity.

16 MR. DEMO: Perfect.

17 THE COURT: But, you know, I saw the certificates of  
18 no objection, but perhaps we need to talk about it in case  
19 anyone wants to comment in any way.

20 MR. DEMO: If anybody does, I mean, if you've already  
21 entered them -- I know PACER was down, so I don't think we've  
22 seen it yet.

23 THE COURT: Okay.

24 MR. DEMO: But we're fine moving on if --

25 THE COURT: Well, yeah. The foreign representative

1 motion looked like a no-brainer, if you will.

2 MR. DEMO: Uh-huh.

3 THE COURT: It was filed way back in October, right?

4 MR. DEMO: Correct. Right.

5 THE COURT: And no one had ever objected. It's just  
6 that there are some foreign proceedings out there; --

7 MR. DEMO: Right. Right.

8 THE COURT: -- you wanted to make sure that there was  
9 a human being who had authority to act in those?

10 MR. DEMO: Correct.

11 THE COURT: All right. So, if no one has any  
12 comment, I did go ahead and sign the order approving that.

13 MR. DEMO: Okay.

14 THE COURT: Similarly, exclusivity. I signed an  
15 order on that yesterday. In probably nine out of ten cases, I  
16 would have had a hearing with evidence.

17 MR. DEMO: Uh-huh.

18 THE COURT: But, again, that one seemed like a no-  
19 brainer. We had no objections, and obviously you've been in  
20 court a lot, with a lot of things happening.

21 MR. DEMO: Yes.

22 THE COURT: So it seemed like a no-brainer to give  
23 more time on that. So, does anyone have anything they wanted  
24 to say about that? (no response) All right.

25 MR. DEMO: Okay.

11

1 THE COURT: So that is granted. I can't remember,  
2 off the top of my brain, what the extended time frame was. Do  
3 you want to say that on the record? Because I've just blanked  
4 out at the moment.

5 (Counsel confer.)

6 MR. DEMO: It's -- we extended it for four months,  
7 Your Honor.

8 THE COURT: Okay. All right. So that was June, June  
9 12th as the deadline for filing a plan, and then the  
10 solicitation period would expire on August 11th, 2020. That's  
11 what I've approved.

12 MR. DEMO: Yes.

13 THE COURT: All right.

14 MR. DEMO: Okay. The next matter is the bar date  
15 motion. There was an automatic bar date set for April 8th --

16 THE COURT: Uh-huh.

17 MR. DEMO: -- in connection with the 341 notice. We  
18 just wanted to have procedures for filing claims approved by  
19 this Court.

20 THE COURT: Okay.

21 MR. DEMO: You know, we filed the motion. There are  
22 no objections. We did have some comments from the United  
23 States Trustee, which we've incorporated into a redlined  
24 order.

25 Something came up last night where, the way that it works

1 because we have a lot of investors, is that a lot of people  
2 get notice through their custodians and through the different  
3 administrators.

4 THE COURT: Uh-huh.

5 MR. DEMO: And so we worked that into the motion.  
6 The United States Trustee has asked for an extension of 45  
7 days for those folks to file their claim. We're okay with  
8 that. We're going to work with her afterwards, and we will  
9 submit a revised form of order.

10 THE COURT: Okay. So, just to be clear, the proposed  
11 deadlines, as revised, would be what?

12 MR. DEMO: It depends on when the notice is actually  
13 able to be sent out.

14 THE COURT: Okay.

15 MR. DEMO: We need to work through some technical  
16 issues on that.

17 THE COURT: Okay. Ms. Lambert?

18 MS. LAMBERT: So, Judge Jernigan, I think the Court  
19 is familiar with this from when we solicit Equity Committees.  
20 It's the same issue here. You go to TD Ameritrade and then  
21 they send the notice to the direct holders, but also asked  
22 that they include correspondence to the TD Ameritrade or  
23 Merrill Lynch equivalents saying -- instructing them to send  
24 the notice of the bar date to their direct holders.

25 So we're going to agree on the phrasing of the letter.

13

1 I'm hopeful that we can attach that to the order so the Court  
2 can see what it looks like.

3 THE COURT: All right.

4 MR. DEMO: Okay. And we'll work through those  
5 issues, Your Honor, and have something to you as soon as  
6 possible.

7 THE COURT: All right. And you're also asking for  
8 bar dates, really, bar date for 503(b)(9) claims as well?

9 MR. DEMO: Yeah. We don't think we're going to have  
10 any.

11 THE COURT: Okay.

12 MR. DEMO: So it's really just out of an abundance of  
13 caution.

14 THE COURT: Okay. All right. Well, I'll look for  
15 that form of order --

16 MR. DEMO: Okay.

17 THE COURT: -- and be happy to sign it as you all  
18 have negotiated it.

19 MR. DEMO: Okay. And then skipping over Foley  
20 Gardere, there is one still outstanding objection on that, so  
21 we will hear that in due course.

22 THE COURT: Okay.

23 MR. DEMO: The next one is Item 6 on Page 6, and  
24 that's the PensionDanmark motion to lift the stay. We have an  
25 agreement in principle with PensionDanmark that the Committee

14

1 has signed off on. We're just going through and working  
2 through the paperwork. And so we would like to just push this  
3 to the next hearing date, with the expectation that we would  
4 get the paperwork filed in between then and we wouldn't have  
5 to have it set.

6 THE COURT: All right. So we will carry this to our  
7 next omnibus hearing date. I don't know if we have one  
8 automatically set at this point or --

9 MR DEMO: It's March 13th.

10 THE COURT: March--?

11 MR. DEMO: 12th.

12 MS. HAYWARD: 11th.

13 MR. DEMO: 11th. I'm sorry. I was in the ballpark.

14 THE COURT: Okay. So, carried to March 11th, as  
15 necessary.

16 MR. DEMO: Uh-huh.

17 THE COURT: All right.

18 MR. DEMO: And then I guess the next thing, skipping  
19 over the CLO Issuers' objection, which we already addressed,  
20 --

21 THE COURT: Uh-huh.

22 MR. DEMO: -- is the sealing conference motion.

23 THE COURT: Okay.

24 MR. DEMO: And I would turn this over to my  
25 colleague, John Morris.

1 THE COURT: All right.

2 MR. MORRIS: Good morning, Your Honor. John Morris,  
3 Pachulski Stang Ziehl & Jones.

4 THE COURT: Good morning.

5 MR. MORRIS: I hope that this doesn't take too much  
6 time. But following the last hearing that we had, the Court  
7 had rendered a ruling with respect to the Committee's sealing  
8 motion. And regrettably, the Debtor and the U.S. Trustee's  
9 Office were unable to agree on a form of order. And that led  
10 to kind of a back-and-forth about the scope of the protective  
11 order that had been entered.

12 So, because we couldn't come to an agreement, and because  
13 the Debtor had concerns about the interpretation and the  
14 position, frankly, that the U.S. Trustee was taking with  
15 respect to the protective order, we filed our motion for the  
16 entry of an order concerning the sealing motion and for a  
17 conference. And that was filed at Docket 397.

18 The Court subsequently entered the Debtor's proposed order  
19 on the sealing motion, on the Committee's sealing motion. So  
20 that's moot.

21 The only issue, to the extent there is an issue, and I'm  
22 not sure that there is, but to the extent that there is an  
23 issue, it was just the Debtor's desire to make clear on the  
24 record that the words of the protective order are clear and  
25 unambiguous and that they apply to any party who receives



1 documents in this bankruptcy case, whether it's in connection  
2 with a contested matter or an adversary proceeding, and that  
3 order applies both to documents previously received and to  
4 documents that will be received in the future.

5 We had asked the U.S. Trustee's Office to make -- just to  
6 agree that they would abide by the protective order. And I'm  
7 not casting aspersions, I'm not saying, you know, they're bad  
8 people or anything, but we never got the crystal-clear  
9 response that we needed and expected, frankly, that the order  
10 says what the order says and the U.S. Trustee's Office would,  
11 you know, would abide by it.

12 THE COURT: Okay. So, --

13 MR. MORRIS: So that's why we asked for this status  
14 conference.

15 THE COURT: So this is more than just the issue of  
16 the Redeemer Committee arbitration award --

17 MR. MORRIS: Correct.

18 THE COURT: -- that was the attachment to the --

19 MS. LAMBERT: No, Your Honor.

20 THE COURT: Wait. Oh, okay. Well, what I was about  
21 to say is I was understanding from your presentation that you  
22 thought this was about more than just the arbitration award,  
23 the Redeemer Committee arbitration award that had been  
24 attached to that Committee objection and that was subject to  
25 the motion to seal.

1           You think it is also about items marked Confidential that  
2 the U.S. Trustee received before the entry of the protective  
3 order?

4           MR. MORRIS: As it explicitly provides for. And I'll  
5 just say that the concerns arise from the written  
6 communications that we received, where the U.S. Trustee's  
7 Office specifically said that they would file matters  
8 unredacted and without seal. And we asked them to simply  
9 retract that statement, because the order says what the order  
10 says. And I think it's a fair concern that the Debtor has in  
11 this regard, and it was really a very simple request. Please,  
12 please, I mean, you can't file documents unredacted and  
13 without seal because there's a protective order in place.

14           THE COURT: Okay. Now, Ms. Lambert, you say -- what  
15 were you about to say?

16           MS. LAMBERT: First, Your Honor, I want to be clear  
17 that the U.S. Trustee -- everyone in the U.S. Trustee's Office  
18 intends to honor the Court's orders. There are many things  
19 that we debate hotly and that we feel animated about in terms  
20 of legal advocacy, but we intend to honor both the office and  
21 the individual that holds that office when the Court has made  
22 a ruling.

23           The issue that is presented to the Court is what is the  
24 effect of dismissing a motion to seal on the basis that it is  
25 moot? There's black-letter law that sealing should be for

1 limited time periods and things should be unsealed --

2 THE COURT: Okay. Can I stop you? Are you saying  
3 that you think the sole issue here is just the arbitration  
4 award?

5 MS. LAMBERT: Yes, Your Honor.

6 THE COURT: Okay. So, so --

7 MS. LAMBERT: And this is how it springs back to the  
8 protective order.

9 THE COURT: Okay. Let me --

10 MS. LAMBERT: The U.S. --

11 THE COURT: Let me stop you, because what about other  
12 documents besides the arbitration award that the U.S. Trustee  
13 might have received prior to the Court signing the protective  
14 order?

15 MS. LAMBERT: The U.S. Trustee did not receive any  
16 other items that --

17 THE COURT: Okay. So we are just talking about the  
18 arbitration?

19 MS. LAMBERT: We have not to this date received any  
20 other items than those items --

21 THE COURT: Okay.

22 MS. LAMBERT: -- that were subject to the motion to  
23 seal.

24 THE COURT: Okay.

25 MS. LAMBERT: And this is the U.S. Trustee's

1 position. The Court --

2 THE COURT: I will say that one of the Debtor's  
3 lawyers is shaking his head. I want to see if there's a  
4 disagreement about, did the U.S. Trustee receive more items?  
5 Was that --

6 MR. MORRIS: I would say, Your Honor, I don't know  
7 exactly what was delivered, because I'm, --

8 THE COURT: Okay.

9 MR. MORRIS: -- right, I'm part of a team. But I do  
10 know that we gave, for example, information about bonus --  
11 about, you know, personnel bonus motions that is confidential.

12 MS. LAMBERT: But the issue about what was going to  
13 be filed unsealed was related to the items in the motion to  
14 seal and the U.S. Trustee's attendant motion for the  
15 appointment of a Chapter 11 Trustee, which had been redacted.

16 THE COURT: Okay. Let me -- I'm going to take a shot  
17 at making this go quicker. What I meant when I ruled that,  
18 well, the objection of the Committee is moot now because it  
19 was resolved by other orders; therefore, I think the motion to  
20 file under seal the arbitration award is moot because it was  
21 connected to the Committee's objection; you know, that was a  
22 quick, off-the-cuff comment. What I was trying to say is I  
23 didn't think this needed any more court time. There was no  
24 case in controversy anymore. I didn't know why I needed to  
25 resolve an objection to the motion to file under seal.

1           What I meant is it's going to be like it never even  
2 happened, right? And what I probably should have done is  
3 said, Committee, you want to make an oral motion to withdraw  
4 your objection and withdraw your motion to seal, you know,  
5 orally, I'll grant it orally and just remove it from the  
6 record, so to speak.

7           And I thought we were passing off to another day whether  
8 that arbitration award, if someone wanted to file it and file  
9 it publicly or disclose it, they could then file a motion  
10 later.

11           MR. MORRIS: Your Honor?

12           MS. LAMBERT: Here's the -- here's the --

13           MR. MORRIS: Your Honor, if I may?

14           THE COURT: Uh-huh.

15           MR. MORRIS: You've done exactly what you've said.

16           THE COURT: Okay.

17           MR. MORRIS: I don't think there is an issue now.

18           THE COURT: Okay.

19           MR. MORRIS: I've heard from the U.S. Trustee's  
20 Office what I asked for probably three times in writing, that  
21 they are going to abide by the terms of the protective order.  
22 With respect to the sealing order, Your Honor has entered an  
23 order. It declared the Committee's motion to seal moot, and  
24 it specifically provided that anybody who's received the  
25 awards has to treat them in accordance with the protective

1 order.

2 THE COURT: Yeah.

3 MR. MORRIS: Nobody's appealed that order.

4 THE COURT: Okay.

5 MR. MORRIS: It's now the -- it's -- whatever the  
6 U.S. Trustee's interpretation is of the law is kind of  
7 irrelevant at this point because the order has been entered  
8 and it hasn't been appealed.

9 THE COURT: Okay.

10 MS. LAMBERT: Here's the thing, Your Honor. The case  
11 law, *Omni Video*, similar things. There are two issues.  
12 Number one is whether the mootness of the underlying issue  
13 means that the pleadings should be unredacted, which is black  
14 letter that at some point pleadings should be unredacted and  
15 made available to the public. And the Court's ruling is that  
16 by replacing the management the Court has mooted anything that  
17 might be scandalous about that or that might be problematic  
18 about it, and therefore --

19 THE COURT: What is the it? I'm not following.

20 MS. LAMBERT: -- the arbitration award and the  
21 pleadings attendant were redacted, but the --

22 THE COURT: I haven't said anything about -- I mean,  
23 I denied a Chapter 11 trustee motion because I thought the new  
24 management was a correct way to go forward in this case.

25 MS. LAMBERT: Correct.

1 THE COURT: The arbitration award, what I meant was  
2 it's like it never happened now. And if I --

3 MS. LAMBERT: Right.

4 THE COURT: -- need to do an amended order saying the  
5 Committee has permission to withdraw the objection and  
6 withdraw the motion to seal, I'll --

7 MS. LAMBERT: That's --

8 THE COURT: -- I'll do that, --

9 MS. LAMBERT: But --

10 THE COURT: -- so there's nothing on the record to  
11 make public.

12 MS. LAMBERT: But withdrawing the motion, objection,  
13 does not delete it from the record, Your Honor.

14 THE COURT: Well, I'm going to make it so. I'm going  
15 to make it so. And then if, one day, you or someone else --

16 MS. LAMBERT: Your Honor, currently, --

17 THE COURT: -- wants to be relieved from the  
18 protective order and asks that it be publicly filed, I'll  
19 consider --

20 MS. LAMBERT: Your Honor?

21 THE COURT: -- the merits of that.

22 MS. LAMBERT: Your Honor, the thing is that the  
23 Committee, when it filed its original objection, did not  
24 redact. So this information has been in the public domain for  
25 months now. And the arbitration --

1 THE COURT: Wait. Okay. This all happened in  
2 Delaware, so I don't know their procedure. Are you saying it  
3 was on the public PACER?

4 MS. LAMBERT: They didn't redact.

5 MR. MORRIS: No. Your Honor, the Redeemer Award  
6 (inaudible). The order says what the order says. It's been  
7 entered. I mean, this is the concern, is that we have this  
8 never-ending debate. I've heard -- the Debtor has heard what  
9 it needed to hear, and that is the U.S. Trustee's Office will  
10 abide by the terms of the protective order.

11 With respect to the Committee's motion to seal, we're done  
12 with that.

13 MS. LAMBERT: There is no --

14 MR. MORRIS: An order has been entered.

15 MS. LAMBERT: There is no motion to seal. The normal  
16 effect of -- the dismissal of a motion to seal on the basis  
17 that it is moot is that everything attendant to that becomes  
18 unredacted and unsealed.

19 In addition, there's a separate issue that the Debtor gets  
20 to talk about what the amounts in the Redeemer awards were  
21 unilaterally, without -- and the Committee gets to talk about  
22 it unilaterally. They've mentioned what the findings were in  
23 four different spots in their objection that are not redacted.  
24 And the U.S. Trustee is the only one that's held to the motion  
25 to seal, which we have honored, but the --



1 THE COURT: I don't understand why we're having this  
2 discussion. For now, I've made it a moot issue, a dead issue.  
3 The objection to which the arbitration award was attached as  
4 an exhibit became moot. Maybe I'm not using the best legal  
5 description, but it was resolved. And I didn't feel the need  
6 for us to have a dispute about whether that motion to seal,  
7 which related to the objection --

8 MS. LAMBERT: The motion to seal --

9 THE COURT: -- was meritorious or not. If -- again,  
10 --

11 MS. LAMBERT: But the motion to --

12 THE COURT: -- to me, there's an easy fix. If you're  
13 -- if you think it's necessary, I'll grant the --

14 MR. MORRIS: Your Honor?

15 THE COURT: This seems like wasted energy, --

16 MS. LAMBERT: But --

17 THE COURT: -- granting the Committee authority to  
18 withdraw their objection and their motion to seal --

19 MS. LAMBERT: But, Your Honor, --

20 THE COURT: -- so that it's off the record.

21 MS. LAMBERT: -- the interim sealing order didn't  
22 impact just their objection. It impacted the U.S. Trustee's  
23 motion to dismiss. It impacted the evidence. The finding  
24 that these issues are moot because they're resolved means that  
25 the Court should unredact them because it's no longer

25

1 confidential. It's no longer a problem. If the evidence is  
2 --

3 THE COURT: Why are we having this discussion? Why  
4 is this important in this Chapter 11 case? The arbitration  
5 award may get in one day, and someone may ask me, and I may  
6 say yes, I may say no. It depends on what the legal arguments  
7 are.

8 MS. LAMBERT: It's --

9 THE COURT: Why is this relevant right now?

10 MS. LAMBERT: It's important to the public's  
11 perception, and the U.S. Trustee is charged with making the  
12 information about a case available to the public.

13 MR. MORRIS: Your Honor, there is no motion --

14 MS. LAMBERT: This -- these -- these arbitration --

15 MR. MORRIS: There's no relief that's been sought.

16 MS. LAMBERT: The arbitration awards have been  
17 discussed in the press, Your Honor. And the press --

18 THE COURT: Well, let me just say this. Okay? This  
19 was obviously -- there was an arbitration award. It was never  
20 confirmed with a judgment by a court. And I am presuming -- I  
21 don't need to decide today -- but I'm presuming that there is  
22 some legal argument that someone feels can be made about why  
23 that arbitration award is confidential. You know, it  
24 obviously --

25 MR. MORRIS: The Committee made that argument in

1 their motion.

2 THE COURT: Obviously, if there had been a judgment,  
3 it all would have been out in the world. And I will say I  
4 cannot remember ever being in a situation where someone wanted  
5 to keep an arbitration award confidential in a bankruptcy  
6 case. Maybe it happens. I'm just -- I've never seen it. So  
7 if there is a day where someone wants me to find this  
8 arbitration award can be made public, I may very well do it.  
9 I don't know. I'll hear the legal arguments. But I am just  
10 asking, why are we arguing about this today?

11 MS. LAMBERT: We're arguing about it today because it  
12 remains a point of interest and a point of information sharing  
13 to government creditors and other creditors that are involved  
14 in the case, as well as the public.

15 THE COURT: They're not in here, the SEC or whoever  
16 you're --

17 MS. LAMBERT: Well, how would they know to be in  
18 here?

19 THE COURT: Because maybe they've seen the press that  
20 you're talking about. All right. I don't know --

21 MR. MORRIS: Your Honor, we -- the Debtor's heard  
22 what --

23 THE COURT: The protective order governs. And my  
24 prior order with regard to the sealing motion I think made  
25 clear, but if it didn't, I'm going to say right now: As far

1 as I'm concerned, the arbitration award, nothing gets unsealed  
2 on the Court's docket, and no one will file it or disclose it  
3 without bringing a motion, and we'll have a legal argument and  
4 evidence or whatever we need and I'll rule on the issue.

5 MS. LAMBERT: So, Your Honor, my understanding is  
6 that the Court is striking the objection to the CRO that the  
7 Committee filed and striking the U.S. Trustee's motion to  
8 dismiss, which was redacted, and striking the evidence, and  
9 those will not be on the docket available to the public at  
10 all.

11 THE COURT: That's not what I'm doing. I don't -- I  
12 don't even know -- I don't understand why you're saying that.

13 MS. LAMBERT: Well, you can't just withdraw the  
14 objection. The objection had the exhibits attached to it.  
15 The issue that the U.S. Trustee -- I'm sorry, but I'm always  
16 charged with this issue -- is trying to unseal documents and  
17 trying to determine the proper date for unsealing them. They  
18 attached to the arbitration award, like a motion for summary  
19 judgment. That's the practice in Delaware. And so the issue  
20 is, at what point will that become unsealed? It's a higher  
21 standard --

22 THE COURT: The answer is no, without an order from  
23 this Court.

24 MS. LAMBERT: It is a higher standard than for  
25 confidentiality. And in addition, --

1 THE COURT: All right. If you want to file a motion  
2 and we set it for hearing and we have briefing, we'll do that.  
3 But, for now, there's -- there are two orders that I will tell  
4 you on the record what they mean is, right now, the  
5 arbitration award is not to be publicly disclosed. Not by the  
6 Court on the docket system. Not by any person.

7 If someone wants to publicly disclose it, they can file a  
8 motion and we'll talk about whether it's protected or not.

9 MR. MORRIS: Thank you.

10 THE COURT: Whether there are grounds, legal grounds,  
11 to protect it.

12 MR. MORRIS: Thank you, Your Honor.

13 THE COURT: I've told you I'm skeptical. I'm  
14 skeptical. But, you know, we'll see. Okay?

15 MS. LAMBERT: Okay. Your Honor, the FJC publication  
16 is very clear that the Court should be trying, when issues are  
17 moot, to unseal items. And this is why our advocacy is this  
18 way. And I will move to unseal it.

19 THE COURT: All right.

20 MR. DEMO: For the record, Your Honor, again, Greg  
21 Demo; Pachulski Stang Ziehl & Jones; for the Debtor.

22 Before we move on to the Foley retention, two quick  
23 housekeeping matters.

24 THE COURT: Uh-huh.

25 MR. DEMO: We would like to set the next omnibus

1 hearing date on April 22nd. At that date, we would do the  
2 quarterly fee applications and whatever else comes up onto the  
3 docket.

4 THE COURT: All right. Have you run that by Traci  
5 Ellison yet?

6 MR. DEMO: We have not.

7 THE COURT: Okay.

8 MR. DEMO: We've talked to the Committee about it,  
9 though.

10 THE COURT: So I will call her right now.

11 MR. DEMO: And then, I guess, Your Honor, before you  
12 do that, we are actually asking for a hearing date on March  
13 4th at 1:30 as well. We're going to have an expedited motion  
14 that we'll be filing, I think, this week. So if you're going  
15 to check with her, I guess it might make sense to check on  
16 both of those dates.

17 THE COURT: Okay.

18 (Court confers with Clerk telephonically.)

19 THE COURT: Okay. We can give you April 22nd, as you  
20 requested, at 9:30.

21 MR. DEMO: Okay. Thank you.

22 THE COURT: Okay. So that's going to be an omnibus.

23 (Court confers with Clerk telephonically.)

24 THE COURT: All right. We can give you March 4th at  
25 1:30.

1           How about a preview of what we're going to -- what are we  
2 going to be seeing?

3           MR. DEMO: And, Your Honor, I guess we had also  
4 reserved March 2nd, and we can release that date.

5           THE COURT: What? I'm sorry.

6           MR. DEMO: We had previously reserved March 2nd at  
7 9:30 for the expedited motion, which I'll describe briefly in  
8 a second. We don't need the March 2nd date.

9           THE COURT: So, okay.

10          MR. DEMO: Yeah.

11          THE COURT: All right. So I'll tell Traci that one  
12 --

13          MR. DEMO: Yeah. Okay. Perfect. Thank you.

14          THE COURT: -- is off. Okay. What is this going to  
15 be?

16          MR. DEMO: The expedited motion, we obviously run a  
17 series of investment funds. From time to time, those funds,  
18 either through liquidation or just through normal proceeds  
19 generation, make distributions out to their investors.

20          Under the protocols, distributions out to what are  
21 related, called related entities under the protocols, which  
22 include Mr. Dondero, entities owned by Mr. Dondero, and  
23 numerous other categories, those entities cannot receive their  
24 distributions from those investment vehicles if the Committee  
25 objects to those distributions unless we come to the Court and

1 we get Your Honor's approval.

2 That issue has come up. We are hoping to make those  
3 distributions to these related entities. The Committee has  
4 said that they will object, but they've also agreed to the  
5 motion to expedite.

6 THE COURT: All right.

7 MR. DEMO: So that's the issue that's going to be in  
8 front of Your Honor on March 4th.

9 THE COURT: All right. When are you going to file  
10 the motion?

11 MR. DEMO: We are hoping to file it, I think, by  
12 Friday.

13 THE COURT: Okay. So that would be -- what are we at  
14 now, the 19th?

15 MR. DEMO: Yeah.

16 THE COURT: Okay. So that'd be --

17 MR. DEMO: Yeah. And obviously, --

18 THE COURT: -- a couple weeks.

19 MR. DEMO: -- yeah, we'll endeavor to get it filed as  
20 soon as possible.

21 THE COURT: Okay.

22 MR. DEMO: And then I guess the last item, Your  
23 Honor, is the Foley Gardere retention application.

24 THE COURT: Okay.

25 MR. DEMO: And, you know, this should be a relatively



1 simple retention application. You know, we'll get into it a  
2 little bit more. There are two objections that were  
3 originally filed, one by the Committee and one by Acis.  
4 Yesterday morning, the Committee withdrew their objection, so  
5 the only objection to the Foley Gardere retention application  
6 is by Acis.

7 In the courtroom with me are Holland O'Neil with Foley  
8 Gardere -- she's the partner in charge of that representation  
9 -- and then also The Honorable Russell Nelms, who's a member  
10 of the Independent Board of Directors of Strand Advisors, the  
11 party that manages the Debtor. And I should be remiss if I  
12 didn't mention that the two other independent directors, James  
13 Seery and John Dubel, are also in the courtroom, --

14 THE COURT: Okay.

15 MR. DEMO: -- as is the Debtor's chief restructuring  
16 officer.

17 And as I said, Your Honor, really, the only thing, the  
18 only substantive thing we're here this morning on is this  
19 retention application. The retention application is under  
20 Section 327 of the Bankruptcy Code, and it's to represent the  
21 Debtor in three matters related to the Acis bankruptcy and the  
22 resulting litigation.

23 Judge Nelms is going to be testifying in support of the  
24 Foley retention this afternoon.

25 THE COURT: Okay.

1 MR. DEMO: We filed the retention application on  
2 October 29th, along with the retention application of Lynn  
3 Pinker. As I mentioned earlier, the Lynn Pinker retention  
4 application was withdrawn. Two objections were filed to the  
5 Foley retention: One by the Committee, one by Acis.

6 The Committee -- or, sorry, the Debtor addressed those two  
7 objections in an omnibus reply that we filed on November 21st.  
8 The primary response to those objections was providing  
9 additional disclosure to this Court concerning the parties  
10 being represented by Foley, the proceedings in which Foley was  
11 going to represent those parties, and the allocation of fees,  
12 of Foley's fees, across those parties.

13 The reply disclosed, and Judge Nelms will also testify,  
14 that the Debtor had originally intended to engage Foley on  
15 four matters, not three. The first matters is general matters  
16 just relating to the Acis bankruptcy, status conferences,  
17 proof of claim issues. The second matter is the appeal to the  
18 Fifth Circuit of the confirmation order. The third matter was  
19 the appeal, again to the Fifth Circuit, of the entry of the  
20 involuntary petition. And then the fourth matter was the  
21 appeal of Winstead's retention as counsel to both Mr. Terry,  
22 who is a pre-petition creditor of Acis, and Robert [sic]  
23 Phelan as the Chapter 11 trustee.

24 The two appeals, the appeal of the confirmation order and  
25 the appeal of the involuntary petition, have been fully

1 briefed to the Fifth Circuit, and some of that briefing was  
2 done, by necessity, post-petition, because of the drag in time  
3 between when we filed the retention and now. And the Fifth  
4 Circuit has actually set both of those appeals for oral  
5 argument. They've been consolidated for purposes of oral  
6 argument, and both of the appeals are set for March 30th, so  
7 about six weeks away.

8 Now, it's an understatement to say a lot has happened in  
9 this case since we filed the reply on November 21st. One of  
10 the most major things in this case, as the Court knows, is the  
11 appointment of the Board of Directors. The Board of Directors  
12 was appointed on January 9th and it oversees the management of  
13 the Debtor. Judge Nelms is in this courtroom and will be  
14 testifying as to what the Board did to familiarize itself with  
15 the Acis litigation and with Foley's retention. And you'll  
16 hear from Judge Nelms that the Board had extensive  
17 conversation with the Debtor's employees, including the  
18 Debtor's internal legal team, Ms. O'Neil with Foley Gardere,  
19 attorneys from Pachulski regarding the status of the Acis  
20 litigation and the bankruptcy and Foley's retention.

21 You'll also hear that Judge Nelms reached out directly to  
22 Josh Terry, the major party in the Acis litigation, and that  
23 Judge Nelms met with both Josh Terry and Ms. Patel to discuss  
24 the status of the Acis litigation.

25 And then finally you'll hear, as part of that diligence,

1 that the Board analyzed the economic benefit of proceeding  
2 with Foley's retention in all three of those matters that I  
3 mentioned and also conducted their own diligence on the claims  
4 that are being raised in those matters.

5 As a result of that diligence, and I'll discuss the  
6 explicit reasons later, the Board determined that it is in the  
7 best interest of the Debtor and its estate to proceed with  
8 Foley's retention with respect to the three matters I  
9 mentioned earlier: the Acis general bankruptcy, the appeal of  
10 the confirmation order, and the appeal of the involuntary  
11 petition.

12 The Debtor has also asked for Foley's assistance on  
13 certain ancillary matters, like including about disclosures of  
14 the Acis litigation, including what needs to go on the  
15 schedules and things like that.

16 As a result of this diligence, however, the Board decided  
17 to drop the Winstead appeal. So Acis -- I'm sorry, Foley is  
18 not going to be retained to challenge Winstead's retention in  
19 that proceeding. And assuming that Foley is retained, Foley  
20 will prepare the papers to withdraw that objection as soon as  
21 possible.

22 As a quick aside, though, you know, Foley was directed by  
23 the Debtor to continue with the Winstead matter post-petition.  
24 Incurred about \$25,000 of fees. And we believe that Foley was  
25 working in good faith on that. So although we're not going to

1 proceed with the Winstead matter, we would still ask that  
2 Foley be entitled to file a fee application for those fees.  
3 The Committee has agreed with this, and we have a form of  
4 proposed order with the Committee that contemplates Foley's  
5 payment or Foley's receiving payment for the Winstead fees of  
6 \$25,000.

7 THE COURT: Wait. You're talking about, if I approve  
8 their retention, rolling that into the retention order?

9 MR. DEMO: We are, Your Honor.

10 THE COURT: Okay.

11 MR. DEMO: No?

12 THE COURT: That's a no-go, I'll tell you right now.

13 MR. DEMO: Okay.

14 THE COURT: I mean, --

15 MR. DEMO: And we can, we can deal with that.

16 THE COURT: Yeah.

17 MR. DEMO: But I --

18 THE COURT: I'm not going to say yes or no to any  
19 fees I haven't seen.

20 MR. DEMO: Okay. And -- well, I'm sorry. What's  
21 going to be rolled into the order is their ability to file for  
22 those fees. Everybody would still have the right to object to  
23 those fees. You would have the right to say yes or no on  
24 those fees. The only thing that we would be asking for is  
25 that they would be able to apply for those fees and that the

1 fact that they weren't retained on that matter specifically  
2 would not be a basis for an objection to those fees. So it's  
3 a little bit different.

4 THE COURT: Okay.

5 MR. DEMO: We're not trying to cut off anybody's  
6 right to object to those fees.

7 THE COURT: Okay. But I don't want to put some  
8 imprimatur on their ability to ask for them.

9 MR. DEMO: Okay.

10 THE COURT: Okay? So, you know, it's just another  
11 day.

12 MR. DEMO: Yeah.

13 THE COURT: If they ask for that in a fee app -- if I  
14 approve their retention and they ask for it in a fee app,  
15 we'll --

16 MR. DEMO: Okay. Understood, Your Honor.

17 THE COURT: -- decide whether it's meritorious or  
18 not.

19 MR. DEMO: Okay.

20 THE COURT: Okay.

21 MR. DEMO: And then I guess, just moving on, you  
22 know, as you'll hear from Judge Nelms, all of the elements of  
23 227(e), you know, have been met. You know, first, Foley is  
24 being retained for a special purpose. Nobody has objected on  
25 that basis.

1 Second, Foley is not being retained to conduct the  
2 Debtor's bankruptcy case. That's my firm, Pachulski Stang.  
3 Again, nobody has objected on that basis.

4 Third, Foley represented the Debtor prior to the petition  
5 date on these matters. Again, nobody has objected on that  
6 basis.

7 And, fourth, you know, as Judge Nelms will testify, the  
8 retention of Foley and Foley's continued prosecution of the  
9 Acis matters is in the best interest of the Debtor's estate.

10 And then fifth and finally, Foley has no adverse interest  
11 with respect to the matters on which it is being retained.

12 Now, as I mentioned, there were two omnibus objections  
13 that were filed. There was the Committee's objection and then  
14 there was Acis's objection. Both of these objections really  
15 had one common theme, which was that there was insufficient  
16 disclosure as to how the fees were going to be allocated, and,  
17 honestly, whether or not Mr. James Dondero would benefit from  
18 Foley's retention without paying his share of those fees.

19 Now, we had a meeting with the Committee on Friday and we  
20 walked through this issue. And as a result of that, the  
21 Committee withdrew its objection.

22 What we told to the Committee is that, prior to the Acis  
23 bankruptcy -- and this goes primarily to the retention -- or,  
24 the prosecution of the involuntary petition appeal. In that  
25 appeal, Foley is representing just Neutra. Foley is not

1 representing the Debtor. Now, the economic benefit to the  
2 estate, though, in that appeal accrues almost solely to the  
3 Debtor. It does not accrue to Neutra or to Neutra's economic  
4 interest owners, which, full disclosure, are Mr. James Dondero  
5 and Mr. Mark Okada.

6 The reason why the Debtor -- and you'll hear, again, hear  
7 this from Judge Nelms -- believes that it's in the economic  
8 best interest of its estate to pay for Neutra's fees in that  
9 appeal is that, if Neutra is successful in that appeal, the  
10 involuntary petition obviously will be struck, the involuntary  
11 will be unwound, and the economic interest and the economic  
12 ownership of Acis will revert to Neutra.

13 Upon that reversion, Highland Capital Management will be  
14 reinstated as the advisor to Neutra.

15 Now, if Neutra -- I'm sorry, if Acis then generates fees,  
16 those fees are going to be paid about 85 percent to satisfy  
17 the contractual obligations under that advisory agreement.

18 So, on a go-forward basis, again, if Neutra is successful,  
19 85 percent of the revenue generated by Acis will go to Neutra.  
20 That remaining 15 percent will be used to satisfy the claim  
21 that Acis -- I'm sorry, that Highland Capital Management has  
22 against Acis for the pre-, post-petition, and gap period  
23 services that it provided to Acis under the advisory  
24 agreements. That claim is about \$8 million.

25 So, 85 percent of the revenue on a go-forward basis is



1 going to be used to satisfy the obligations under the  
2 management agreement. The balance of that is going to be used  
3 to satisfy that \$8 million claim.

4 That means that, you know, if our math is right -- and  
5 obviously, the numbers are not static -- that there's not  
6 going to be any contributions or any distributions to the  
7 upstream equity, to Mr. Dondero or Mr. Okada, for about four  
8 years. After that four years, 85 percent of the revenue is  
9 still going to go to Highland Capital Management, the Debtor,  
10 under those advisory agreements.

11 So for that reason, we do believe, and Judge Nelms will  
12 testify, that the true economic beneficiary of the Neutra  
13 appeal of the involuntary petition is actually Highland  
14 Capital Management.

15 THE COURT: I don't want to jump ahead too much, but  
16 are we going to talk today about mootness as a potential issue  
17 with both of these appeals? I mean, you know, I have to say  
18 it's very compelling to me that you tell me all the briefing  
19 has been done --

20 MR. DEMO: Uh-huh.

21 THE COURT: -- and oral argument is set in March, so  
22 -- but is mootness a --

23 MR. DEMO: We don't --

24 THE COURT: Was there ever a motion to dismiss for  
25 mootness or --

1 MR. DEMO: Not that I'm aware of, Your Honor.

2 THE COURT: Okay.

3 MR. DEMO: And all the briefing has been done.

4 THE COURT: Okay.

5 MR. DEMO: Again, oral argument is set. And as far  
6 as I know, nobody has raised that issue.

7 THE COURT: Okay.

8 MR. DEMO: So I think that we're still proceeding as  
9 to whether --

10 THE COURT: And, again, I'm leaping ahead, but I'm  
11 just -- you know, you went through the scenario --

12 MR. DEMO: Uh-huh.

13 THE COURT: -- to show that, you know, Dondero and --  
14 if the involuntary was reversed, you know, no money would ever  
15 get there. But you're painting a picture, to me, that, again,  
16 it feels a little farfetched. But the evidence will either,  
17 you know, bear it out or not.

18 MR. DEMO: Again, the evidence, you know, I think,  
19 will bear it out.

20 And I think what's important also is, when you're thinking  
21 about this, is to think of the actual universe of post-  
22 petition fees that Foley is going to incur for those services,  
23 for the briefing of the two appeals and then for the  
24 bankruptcy services, versus the actual economic gain that the  
25 Debtor could and hopefully will get if those appeals are

1 successful.

2 THE COURT: Okay.

3 MR. DEMO: So, Foley --

4 THE COURT: And hopefully the evidence will really go  
5 to this.

6 MR. DEMO: Yes.

7 THE COURT: I'm trying to think of -- I'm trying to  
8 decide what life looks like --

9 MR. DEMO: Right.

10 THE COURT: -- if there is a successful reversal.

11 MR. DEMO: Right.

12 THE COURT: And I'm not at all clear. So the  
13 evidence and argument will hopefully make me clear.

14 MR. DEMO: Yes. And, honestly, Your Honor knows the  
15 facts and circumstances --

16 THE COURT: Right.

17 MR. DEMO: -- better than me and probably better than  
18 anyone.

19 THE COURT: Uh-huh.

20 MR. DEMO: But I think what's --

21 THE COURT: I mean, we've had -- we had terminated  
22 contracts --

23 MR. DEMO: Right.

24 THE COURT: -- with Highland. We have a Reorganized  
25 Debtor now, which, you know, --

1 MR. DEMO: Right.

2 THE COURT: -- has new contractual arrangements.

3 MR. DEMO: Right.

4 THE COURT: I just, I'm not sure how that all goes  
5 away if there's a reversal. So I'm --

6 MR. DEMO: Right.

7 THE COURT: I'm really wanting to drill down on the  
8 benefit --

9 MR. DEMO: Okay. And --

10 THE COURT: -- to Highland.

11 MR. DEMO: And we can do that. But I think --

12 THE COURT: Okay.

13 MR. DEMO: -- it's helpful to talk about --

14 THE COURT: Uh-huh.

15 MR. DEMO: -- the universe of fees first and then  
16 talk about the related benefit for that.

17 Foley Gardere has helpfully filed two post-petition fee  
18 applications. Those fee applications disclose that, on all  
19 three of these matters, Foley has billed about \$330,000. We  
20 believe that Foley was probably going to bill, up through the  
21 end of oral argument, about \$500,000.

22 And then, you know, again -- and not getting too deep into  
23 it, because I do think this is something that's better for  
24 testimony because I think it goes to, you know, what the Board  
25 believes is the economic benefit to the estate -- but if the

1 Neutra appeal is successful, if the confirmation order appeal  
2 is successful, then the post-petition fees that are going to  
3 accrue or we believe are going to accrue to Highland Capital  
4 Management under those contracts are tens of millions of  
5 dollars a year.

6 The post-petition and gap period and pre-petition fees  
7 that we believe that Acis owes to Highland are \$8 million a  
8 year. And then there's the go-forward fees.

9 So we believe that, for spending \$500,000, the benefits to  
10 the estate are actually going to be in the tens of millions of  
11 dollars. So, you know, even though, you know, reasonable  
12 minds can differ as to the merits -- and, again, we'll put on  
13 some testimony about that, although there's obviously  
14 privilege issues and things like that -- the actual economic  
15 benefit to the estate is \$500,000 versus the possible benefit  
16 of \$50 million, possibly more dollars, plus the removal of a  
17 substantial portion of Acis's proof of claim, which is -- I  
18 think it says not less than \$75 million. So you're looking  
19 at, if we're successful, fees into the estate --

20 THE COURT: Well, that's a different issue, though.  
21 Isn't that --

22 MR. DEMO: It is, but it --

23 THE COURT: Isn't that the Acis adversary proceeding  
24 component?

25 MR. DEMO: Yes.

1 THE COURT: So, --

2 MR. DEMO: But if the -- if the -- and, again, I  
3 don't want to get too far into this --

4 THE COURT: Uh-huh.

5 MR. DEMO: -- because I don't want to get into, you  
6 know, legal arguments that are going to be on appeal.

7 THE COURT: Uh-huh.

8 MR. DEMO: But what we believe is that, and what  
9 Judge Nelms will testify to and what you'll hear, is that if  
10 the confirmation order and the involuntary petition are  
11 erased, especially the involuntary petition, and we go back to  
12 status quo ante, the benefit to the estate is going to be in  
13 the tens of millions of dollars, at a minimum, plus the  
14 possible diminution, to a large extent, of a proof of claim  
15 that is not less than \$75 million, and we've heard numbers of  
16 up to \$300 million.

17 So you're looking to spend \$500,000 on these two matters  
18 for a benefit to the estate that's going to be astronomically  
19 more than that. So the benefit to the estate versus the money  
20 that is going out of the estate, especially since everything  
21 has been briefed and set for oral argument, I guess,  
22 personally, I find it difficult to not see that benefit and  
23 not to see that spending that half a million dollars to  
24 possibly get back \$50-plus million, I just don't see how  
25 that's not a benefit to the estate and how that does not

1 warrant the retention of Foley Gardere in the limited matters  
2 that we're honestly asking them to be retained for.

3 THE COURT: All right.

4 MR. DEMO: Okay.

5 THE COURT: I'll hear other opening statements on  
6 this.

7 MR. LAMBERSON: Good morning, Your Honor. Phillip  
8 Lamberson on behalf of Acis Capital Management.

9 First of all, let me start off with outlining exactly what  
10 our limited objection relates to. We are not objecting to the  
11 Debtor retaining Foley Gardere to handle the litigation  
12 matters for the Debtor. So, for example, the Acis litigation,  
13 anything related to the Acis bankruptcy, that's fine. We  
14 don't have any objection to that.

15 THE COURT: So the mega-adversary proceeding against  
16 Highland and affiliates that is stayed, --

17 MR. LAMBERSON: Uh-huh.

18 THE COURT: -- I have a giant Report and  
19 Recommendation on my desk that was ready to go about the time  
20 the Highland bankruptcy was filed -- but it's stayed: You  
21 would have no objection to Gardere defending Highland --

22 MR. LAMBERSON: Correct.

23 THE COURT: -- in that if ever a motion to lift stay  
24 is filed and that goes forward?

25 MR. LAMBERSON: Correct.

1 THE COURT: Okay.

2 MR. LAMBERSON: And, for example, I believe counsel  
3 mentioned this: To the extent that there's a status  
4 conference in the Acis case or something like that, we don't  
5 have any issue with Foley representing the Debtor as it  
6 relates to that.

7 We don't have any objection to the representation of the  
8 Debtor as it relates to the Debtor's appeal of the  
9 confirmation order. We don't have any objection to Neutra's  
10 retention of Foley at all. In fact, we don't have any basis  
11 to object to Neutra's retention of Foley Gardere. Neutra is  
12 not a debtor.

13 We fully expect and anticipate that we'll be opposite  
14 Foley Gardere in the appeal which is going to be argued at the  
15 end of next month, as well as any matters in front of this  
16 Court.

17 What we do object to is the Debtor agreeing -- frankly,  
18 pre-agreeing -- to pay Foley Gardere for litigation costs  
19 incurred by non-debtors, and, specifically, Neutra. And as  
20 counsel outlined, and the reply filed by the Debtors is very  
21 clear on this point, Neutra is not a subsidiary of the Debtor.  
22 Neutra is ultimately owned one hundred percent by Mr. Dondero  
23 and Mr. Okada.

24 So why, why are we objecting? There's a couple of  
25 reasons. Number one, this is obviously an extremely unusual



1 request. It's not really a --

2 THE COURT: Okay. Let me just make sure I heard you  
3 correct. The only thing that Acis is objecting to is the  
4 Debtor paying fees for Gardere -- Foley Gardere's  
5 representation of Neutra?

6 MR. LAMBERSON: Correct.

7 THE COURT: Okay. So, --

8 MR. LAMBERSON: Right. And let me --

9 THE COURT: -- you don't have a problem with Foley  
10 representing the Debtor in these appeal -- well, the Debtor  
11 isn't an appellant in the involuntary appeal, right? Or no?

12 MR. LAMBERSON: It is -- no. So, the Debtor is an  
13 appellant in the --

14 THE COURT: The confirmation order.

15 MR. LAMBERSON: -- confirmation order appeal.

16 THE COURT: Uh-huh.

17 MR. LAMBERSON: It's one of two appellants.

18 THE COURT: Uh-huh.

19 MR. LAMBERSON: The other one is Neutra.

20 THE COURT: Uh-huh.

21 MR. LAMBERSON: Neutra is the only appellant in the  
22 confirmation order -- I'm sorry, in the order for relief  
23 appeal.

24 THE COURT: Okay. So you don't have any problem with  
25 Foley's retention; it's just you don't want the Debtor to pay

1 Neutra's legal fees?

2 MR. LAMBERSON: Correct.

3 THE COURT: And there needs to be some allocation in  
4 the confirmation appeal between Neutra and the Debtor, and it  
5 needs to all be paid by Neutra, --

6 MR. LAMBERSON: Correct.

7 THE COURT: -- not the Debtor? Okay.

8 MR. LAMBERSON: Yeah. That's exactly correct, Your  
9 Honor.

10 THE COURT: Okay. Just --

11 MR. LAMBERSON: So I wanted to be clear on that, --

12 THE COURT: Okay.

13 MR. LAMBERSON: -- that we're not -- we understand  
14 that they're --

15 THE COURT: Okay.

16 MR. LAMBERSON: -- going to be our opponents going  
17 forward, and we're fine with that.

18 THE COURT: Uh-huh.

19 MR. LAMBERSON: I actually like Mrs. O'Neil.

20 So, why are we objecting? So, there's a couple of  
21 reasons. One is procedural and one is really more  
22 substantive. So, this is obviously a strange request under  
23 Section 327. 327 is to approve counsel for the Debtor, for  
24 the estate. And this request doesn't really fit.

25 So, for example, you engage Foley Gardere. You agree that

1 the Debtor is going to pay fees under 330. Okay. Well, how  
2 do we apply 330 in this situation, right? What constitutes  
3 reasonable and necessary as it relates to the Debtor when the  
4 work wasn't done for the Debtor? What constitutes a  
5 determination of whether it was beneficial to the Debtor when,  
6 again, the work wasn't done for the Debtor?

7 There's other issues, obviously. Who controls Neutra?  
8 It's not controlled by the Debtor. The Debtor doesn't own any  
9 of Neutra. Who is making litigation decisions for Neutra?  
10 All we know is that the Debtor is paying the freight for  
11 whatever Neutra decides to do going forward.

12 The other issue, Your Honor, and this is probably the  
13 broader issue, is this decision evidences a continuation of a  
14 failed litigation strategy that precipitated this bankruptcy  
15 in the first place. Right? So, we all heard that the reason  
16 Highland Capital Management had to file bankruptcy is because  
17 they couldn't pay the Crusader judgment. Right? They had a  
18 \$190 million judgment, or about to be judgment against them,  
19 and they couldn't pay it.

20 So let's look at the Committee. Right? We have a  
21 Committee with four members on it. Three of them are  
22 litigants. Three of them are in active litigation against the  
23 Debtor.

24 If you look at the Top 20 List in this case, of the Top  
25 10, only one of them is not a litigation creditor, and that's

1 -- I'm trying to -- is an insider creditor. The rest of the  
2 Top 10 are either litigation adversaries or they're law firms  
3 that were paid to fight the litigation adversaries.

4 So why is the Debtor continuing its strategy of fighting  
5 every last issue, and using various instrumentalities to do  
6 it, and then paying the freight for all of it? That's exactly  
7 how we got to where we are today in this case.

8 So, let me address also the benefit from the Neutra  
9 appeal. And, Your Honor, I think that's definitely an area  
10 that we need to probe. Because, like you, I don't get it. I  
11 think what they're outlining is sort of a fantasyland where  
12 money is going to rain from the sky when they win this appeal,  
13 or if they win this appeal. And obviously, their reply goes  
14 on for pages about the benefit to the Debtor.

15 So, just using basic odds of winning -- and I'm not going  
16 to go to the substance of this appeal, which I think is  
17 probably worse than the basic odds -- there's a 90 percent  
18 chance that the Fifth Circuit just affirms the -- Judge  
19 Fitzwater's ruling. Right? I mean, there's a 90 percent  
20 chance that what the Debtor gets out of this is an affirmance  
21 that says, "You lose." Right?

22 But even if it's reversed, --

23 THE COURT: What are you basing that on? Because  
24 Fitzwater affirmed 90 percent of the time?

25 MR. LAMBERSON: Well, so, actually, Judge -- and Ms.

1 Chiarello can probably address this more specifically -- Judge  
2 Fitzwater actually gets affirmed, I think, more than 90  
3 percent of the time, --

4 THE COURT: Probably, yes.

5 MR. LAMBERSON: -- but the general reversal rate at  
6 the Fifth Circuit is about ten percent. So, and that  
7 obviously includes things like 1983 appeals and things like  
8 that.

9 But even if it is reversed, which I think we'd all agree  
10 is fairly unlikely, again, money isn't just going to start  
11 raining down on Highland Capital. So what's most likely going  
12 to happen if the Fifth Circuit decides to reverse -- and let  
13 me, let me point out one issue, Your Honor. The only issue on  
14 appeal, I should say the only -- there are various issues on  
15 appeal, and I'll just click through them. So, one of them is  
16 whether Neutra has standing to appeal. Right? Whether they  
17 qualify under the person aggrieved standard that the Fifth  
18 Circuit uses. That's obviously a gating issue. And, by the  
19 way, that's the basis of Judge Fitzwater's ruling affirming  
20 this Court's ruling, which was basically Neutra doesn't have  
21 standing to appeal the order for relief. They're not the  
22 Debtor.

23 So the first issue is whether Neutra is a person  
24 aggrieved. Okay?

25 The second issue, and this is the substantive bankruptcy

1 issue, the only substantive bankruptcy issue, is whether the  
2 order for relief should have been arbitrated. Right? So  
3 that's the next issue. That would be, frankly, the issue that  
4 the Fifth Circuit would have to reverse on, is that well, yes,  
5 this should have been arbitrated. Right? The order for  
6 relief should have been arbitrated.

7 And then the final issue that we raised on appeal is  
8 whether, even if Neutra has standing and even if there was  
9 some right to arbitration, whether Neutra, via the putative  
10 debtor, waived its right to arbitration by waiting until  
11 literally, and you'll remember this, literally the day before  
12 the order for relief file started, to raise its request for  
13 arbitration. Right?

14 So, assuming that they get some reversal, what's really  
15 likely to happen is that the Court, the Fifth Circuit is going  
16 to send it back to you on a remand and say, This is the  
17 standard you should have applied, you need to make this  
18 finding, or something like that, right? It's very unlikely  
19 the Fifth Circuit is going to say, We're going to reverse and  
20 we're just going to render, right, and this thing just goes  
21 away forever, particularly considering that the only live  
22 substantive issue is whether the order for relief should have  
23 been arbitrated, right?

24 But even if Neutra wins and its relief is wholly granted,  
25 well, what does that mean? That doesn't mean that the

1 involuntary goes away. It doesn't mean the order for relief  
2 permanently goes away. It means that we go arbitrate it.  
3 Right? That's what they asked for, is that we go arbitrate  
4 it. So now we go arbitrate it. Right?

5 So, basically, if you break it down, if, in the unlikely  
6 event Neutra wins on appeal, it doesn't mean the bankruptcy  
7 permanently goes away. What it means is we have more  
8 litigation. Right? And that's what normally happens when  
9 there's a reversal on appeal, right? You relitigate the  
10 issues that were litigated in the first place.

11 So this concept -- you're exactly right, Your Honor. This  
12 sounds like fantasyland. This concept that money is just  
13 going to fall out of the sky and onto Highland because Neutra  
14 got a reversal is just not going to happen.

15 There's some other problems here, obviously. Counsel just  
16 spent a lot of time talking about how all of Acis's funds are  
17 going to get paid to Highland. Well, that completely misses  
18 the point that Josh Terry has an eight, probably somewhere in  
19 the neighborhood of maybe \$12 million judgment now against  
20 Acis. They're just going to ignore that? They're just going  
21 to ignore the fact that their largest creditor has a judgment  
22 against them and is just hanging out there? That's going to  
23 have some impact on what happens to all that cash flow.

24 And then, finally -- and we'll talk about this in more  
25 substance when we get to the testimony -- as you recall, this

1 was the entire basis of the Acis case: Mr. Dondero and  
2 Highland Capital were aggressively trying to liquidate Acis  
3 when we showed up in your Court asking for relief. So what  
4 makes anybody think that that isn't going to continue  
5 happening if there's not a bankruptcy anymore? Right?

6 And Your Honor will recall that you had to twice enjoin  
7 Dondero affiliates, HCLOF, from liquidating the PMAs and  
8 Acis's assets during the bankruptcy. Right? So the concept  
9 that if they win on appeal and there is no bankruptcy,  
10 everything just goes away and we're not in this Court at all,  
11 that Acis is going to have all of these valuable PMAs and cash  
12 flow and it's all going to go to the benefit of Highland, is  
13 completely contrary to what happened during the Acis case and  
14 what precipitated the Acis case.

15 One other issue that we raised in the objection and in the  
16 Debtor's omnibus reply is what we call the DAF litigation,  
17 which is litigation filed in the Southern District of New  
18 York. And Your Honor, I think you probably remember that from  
19 the pleadings. I do want to point out that -- so this, this  
20 is a serious issue for Acis. And the reason is because,  
21 contrary to what was stated in the reply -- admittedly, this  
22 happened after the reply -- but contrary to what happened --  
23 was stated in the reply, that litigation has now been expanded  
24 to include Acis and Mr. Terry and Brigade, and with basically  
25 the same allegations of CLO mismanagement that were raised in



1 this Court during the confirmation hearing.

2 So this is a very significant matter to us. We are very  
3 concerned that this Debtor is involved in that and is  
4 promoting it in some way. And we want Your Honor to be aware  
5 of that litigation and the actions that are taken challenging  
6 your rulings in a court that's miles and miles away from here.

7 Thank you, Your Honor.

8 THE COURT: All right. Mr. Morris, are you ready to  
9 call your witness?

10 MR. MORRIS: Yes, I am, Your Honor. The Debtor calls  
11 Russell Nelms.

12 THE COURT: All right.

13 MR. MORRIS: Your Honor, I have some exhibit binders.  
14 May I hand up?

15 THE COURT: You may. All right. Well, odd as it is,  
16 I suppose I in this context need to swear you in.

17 RUSSELL NELMS, DEBTOR'S WITNESS, SWORN

18 THE COURT: All right. Please be seated.

19 MR. MORRIS: John Morris for Pachulski Stang Ziehl &  
20 Jones on behalf of the Debtor, Your Honor.

21 Before we get to the testimony, the Debtor has put on its  
22 exhibit list nine specific documents that are in the binder  
23 before you, and the Debtor moves for the introduction of those  
24 documents into evidence.

25 THE COURT: All right. Any objection?

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1 MR. LAMBERSON: No objections, Your Honor.

2 THE COURT: Exhibits 1 through 9 are admitted.

3 (Debtor's Exhibits 1 through 9 are received into  
4 evidence.)

5 MR. MORRIS: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Mr. Nelms, do you currently have a relationship to the  
9 Debtor?

10 A I do.

11 Q And what is that relationship?

12 A I am one of three independent directors of the Debtor.

13 Q And when were you appointed?

14 A January the 9th of this year.

15 Q Did you just listen to the opening statement on behalf of  
16 Acis?

17 A I did.

18 Q And did you hear the reference to the DAF litigation?

19 A I did.

20 Q And did you hear the allegation that the Debtor somehow  
21 was involved in the prosecution of the DAF litigation?

22 A I heard that, yes.

23 Q Okay. Did there come a time last week that the Board  
24 learned of the possibility of a filing with respect to the DAF  
25 litigation?

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1 A We learned about the filing of the DAF litigation sometime  
2 within the last two weeks.

3 Q And what did the Board do in response to learning that  
4 information?

5 A Well, first of all, I -- we met with Ms. Patel and her  
6 client, Josh Terry. They expressed their concerns about the  
7 DAF litigation. And so the Board used its influence to  
8 encourage the trustee of the DAF, Grant Scott, to dismiss that  
9 litigation, and we have gotten Mr. Scott's commitment to  
10 dismiss the litigation.

11 There's a little bit of an issue there concerning about  
12 whether some of the claims can -- they may need to be  
13 dismissed without -- the preference is, of course, to dismiss  
14 them without prejudice, but there are some issues about that.  
15 But I'm told by Mr. Scott that he's going to dismiss the  
16 litigation.

17 Q Let's go back in time before this was filed. Did the  
18 Board express its view as to whether there should be a filing  
19 at all?

20 A It was really a very brief thing. This was probably a  
21 couple weeks or so ago, kind of late in the day at the end of  
22 a long, long day, one of those long days we've been having.  
23 Someone brought into a board meeting I guess a copy of this  
24 new DAF complaint. It had not been filed at that time. They  
25 showed it to Mr. Dubel. He looked at it and just kind of

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1 asked what it was. There was a brief explanation of what it  
2 was. And Mr. Dubel said, Tell them not to file this. He  
3 goes, This is only going to cause us problems. And that's the  
4 last we heard of it before it was filed.

5 Q And what law firm filed that complaint?

6 A That was filed by the Lynn Pinker firm.

7 Q And after the Board learned that Lynn Pinker filed this,  
8 in spite of the Board's instructions, did the Board take any  
9 steps with respect to Lynn Pinker?

10 A Well, of course, we -- one of the matters that previously  
11 was before the Court was the Lynn Pinker application to be  
12 retained in this case. And I'll just say that it was -- it  
13 was a factor that went into our deliberations concerning our  
14 decision not to go forward with the Lynn Pinker litigation.

15 Q So, I just want to make sure I have this right. So the  
16 Board, upon learning of a possible filing, gave instructions  
17 not to do so; is that right?

18 A It did.

19 Q And upon learning that it was filed, it became one of the  
20 factors that the Board relied upon in determining not to  
21 pursue the Lynn Pinker retention; is that right?

22 A That's correct.

23 Q And you personally reached out to Mr. Terry and Ms. Patel  
24 to discuss the issue; is that right?

25 A Mr. Seery and I did, the two of us.

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1 Q And you used whatever influence you had to try to reach an  
2 agreement for the withdrawal of that complaint without  
3 prejudice; is that right?

4 A That's correct.

5 Q Okay. Now, let's get back to the issues that are relevant  
6 to the actual motion. Are you aware that the Debtor has  
7 sought the Court's approval to retain Foley Gardere as special  
8 counsel?

9 A I am.

10 Q And have you reviewed the court filings with respect to  
11 that motion?

12 A Yes, I have.

13 Q Okay. Can you describe for the Court generally the  
14 matters for which the Debtor seeks to retain Foley Gardere?

15 A There are three matters, essentially. One is an appeal in  
16 the Fifth Circuit which concerns the entry of the order for  
17 relief in the involuntary petition itself. The second is an  
18 appeal in the Fifth Circuit that concerns the confirmation of  
19 the Acis plan. And the third matter is the assertion of,  
20 prosecution of a proof of claim that Highland Capital  
21 Management would have in the Acis bankruptcy.

22 Q Okay. And are these the special purposes for which the  
23 Debtor seeks to retain Foley?

24 A Yes.

25 Q Do you know whether there are matters that were part of

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1 the original motion but which the Debtor no longer seeks to  
2 pursue?

3 A One of the matters that was pending when we took office  
4 was an appeal, and I believe it was still in the District  
5 Court, and that related to an alleged conflict of interest by  
6 the Winstead firm. And so there was an objection to their  
7 fees and an appeal concerning payment of Winstead fees. And  
8 the Board has decided not to go forward with that appeal.

9 Q Okay. So the Board -- did you hear the opening from  
10 Acis's counsel that charged that the Debtor was just doing  
11 more scorched-earth litigation tactics? Did you hear that  
12 charge?

13 A I heard that, yes.

14 Q Okay. But yet the Board has instructed Foley not to  
15 pursue the Winstead matter; is that right?

16 A That's correct.

17 Q And just again, for the record, why did the Board make  
18 that decision?

19 A The Board made that decision because we just thought it  
20 was in the best interest of the Debtor and this estate not to  
21 do that.

22 Q And did the Debtor see any benefit to pursuing that  
23 particular litigation?

24 A You know, there -- a benefit could be articulated, but we  
25 decided not to pursue it.

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1 Q Okay. So, that, plus the Neutra appeal, are two -- I  
2 mean, I apologize, withdrawn. That, plus the DAF matter, are  
3 two examples where the Board exercised its judgment not to  
4 pursue pending litigation; is that fair?

5 A That's correct.

6 Q Okay. Is the Board supportive of the Debtor's application  
7 to retain Foley for the three matters you have described?

8 A It is.

9 Q And without revealing privileged communications, can you  
10 describe generally the diligence that the Board conducted to  
11 reach that decision?

12 A Well, we met with some of the people that work at  
13 Highland. We met with the Debtor's attorneys, the Pachulski  
14 firm. We did have a couple of meetings with Ms. Patel and Mr.  
15 Terry. Some of us have reviewed the pleadings, some more than  
16 others. And, well, we may have done other things, but those  
17 are the ones that come to mind right now.

18 Q I don't know if you mentioned it, but did you confer with  
19 Ms. O'Neil?

20 A Oh, yes, we did. We talked with Ms. O'Neil about it.

21 Q Okay. And what was the purpose of the diligence that you  
22 just described for the Court?

23 A Well, ultimately, what we as a board were trying to do was  
24 to conduct kind of a cost-benefit analysis to the estate: How  
25 much will this potentially cost us? What's the potential

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1 upside of pursuing it? And based upon that cost-benefit  
2 analysis, we thought that this was the best thing to do.

3 Q Okay. Let's just focus on a couple of very narrow 327(e)  
4 issues. Is the Debtor seeking to retain Foley to act as  
5 general bankruptcy counsel?

6 A No.

7 Q And which firm serves as general bankruptcy counsel?

8 A That would be the Pachulski firm.

9 Q Okay. And do you know whether Foley Gardere represented  
10 the Debtor's interest in each of the three matters that you've  
11 described?

12 A It has been representing the Debtor previously.

13 Q Okay. So let's talk about those three matters. The first  
14 one I believe you said was with respect to the representation  
15 of the Debtor in connection with an \$8 million claim that it  
16 has against Acis; is that right?

17 A That's correct.

18 Q And is that the claim -- is that the subject of a formal  
19 proof of claim?

20 A Yes.

21 Q Okay.

22 A It is a claim filed in the Acis case.

23 Q I've placed before you an exhibit binder, and I would ask  
24 you to turn first to Exhibit 4.

25 A Okay.



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1 Q And is that one of the proofs of claim that the Debtor has  
2 filed against Acis?

3 A It is.

4 Q And you'll see that attached to the proof of claim a few  
5 pages in there's a document called the Third Amended and  
6 Restated Sub-Advisory Agreement. Do you see that?

7 A Yes.

8 Q Do you know what that document is? Generally?

9 A Well, generally, I know what this document is.

10 Q All right. And what's your general understanding of the  
11 document?

12 A This is an advisory agreement that -- the only thing that  
13 I know, I can tell you, really, about this agreement is it  
14 gives rise to and generates fees that would inure to the  
15 benefit of the Debtor.

16 Q Okay. And a few pages past that, you'll see something  
17 called a Fourth Amended and Restated Shared Services  
18 Agreement. Do you see that?

19 A Yes.

20 Q Is it your understanding that that was another source of  
21 revenue that the Debtor generated when it had this agreement  
22 in place with Acis?

23 A Yes.

24 Q Okay. Do you have an understanding as to, you know,  
25 ballpark, what the annual fees were that the Debtor received

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1 pursuant to these agreements prior to the Acis bankruptcy?

2 A Well, I think, prior to the bankruptcy, it was more, and  
3 perhaps significantly more, than it is today. It may have  
4 been in the \$12 million range per annum. I think it's less  
5 than that today.

6 Q Okay. And can you turn to Exhibit 5, please? Is that  
7 another proof of claim that was filed in the bankruptcy case,  
8 the Acis bankruptcy case?

9 A Yes. This is a little bit different. This is an  
10 application for an administrative expense claim. The prior  
11 proof of claim that we looked at related to a pre-petition  
12 claim that the Debtor had, then a gap period claim that the  
13 Debtor had, and this is post-petition. So this is an  
14 administrative claim. It's basically for the same services,  
15 but just different time periods.

16 Q Okay. And who was responsible for preparing Exhibits 4,  
17 5, and 6?

18 A Ms. O'Neil and the Foley firm.

19 Q Okay. And has the Board reached a conclusion that it's in  
20 the Debtor's best interest to retain Foley on a post-petition  
21 basis to prosecute these claims?

22 A It has.

23 Q And why -- what's the justification for that? Why did the  
24 Board reach that decision?

25 A Well, we believe it's in the best interest of the Debtor.

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1 Obviously, a couple of things there. I realize we may have a  
2 very long road ahead of us with respect to these things. But  
3 the overall aspirational goal is to have an income stream  
4 that's associated with these agreements. The goal is to have  
5 an amount of money out there that's available to pay our pre-  
6 petition claims, the gap claims, the administrative claims,  
7 while at the same time acknowledging that this company has the  
8 obligation to satisfy and fulfill Mr. Terry's claim as well.

9 Q All right. Let's just focus for the moment on the three  
10 proofs of claim. The aggregate amount is approximately \$8  
11 million. Do I have that right?

12 A Yes, that's right.

13 Q And from the Board's perspective, is the -- are those  
14 claims an asset of the estate?

15 A They are.

16 Q And does the Board want to retain Foley for the purpose of  
17 trying to recover that asset?

18 A It does.

19 Q And has the Board concluded that Foley is familiar with  
20 these particular claims?

21 A Foley is familiar with these claims, yes.

22 Q And -- okay. Let's move on, then, to the second task for  
23 which the Debtor seeks approval to retain Foley, and that is  
24 with respect to the confirmation order. That's one of the  
25 tasks, right?

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1 A It is.

2 Q Okay. And this is one of the Fifth Circuit arguments  
3 that's scheduled for six weeks from now; is that right?

4 A That's correct.

5 Q Okay. And has Foley represented the Debtor throughout the  
6 proceedings that are leading up to this oral argument?

7 A It has.

8 Q And did Foley prepare all of the briefing in connection  
9 with the arguments?

10 A It did prepare the briefing. It did that, in some  
11 respects, along with Lynn Pinker.

12 Q Okay. Did you personally review the Debtor's briefs that  
13 were filed in connection with the appeal?

14 A I have reviewed those.

15 Q Okay. Have you reviewed every single piece of the record  
16 on appeal?

17 A I would doubt that I have.

18 Q Okay. Do you have a general understanding of the nature  
19 of the appeal? Of -- and this would --

20 A Are we talking now about the confirmation appeal?

21 Q Yes. Just the confirmation. Yeah.

22 Q Well, the appeal has basically two broad elements, and the  
23 first is an argument that the plan was not brought in good  
24 faith. Section 1129(a)(3). And that goes back to the  
25 arbitration issue. Generally speaking, that because -- the

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1 allegation is that because Mr. Terry refused to arbitrate,  
2 then the plan was tainted by that lack of good faith. And the  
3 second issue, broad issue that's involved in that appeal has  
4 to do with, oh, the injunction, the breadth and scope of the  
5 injunction, which the Debtor contends is -- was improper.

6 Q And if the Fifth Circuit reverses the underlying decision,  
7 has the Board made a determination of the possible benefits  
8 that the Debtor may receive?

9 A Well, there's two aspects of that appeal. One would be a  
10 narrower decision. I suppose, if it's just related to the  
11 injunction, it's -- it's hard to quantify exactly what that  
12 would mean.

13 Q Okay.

14 A The bigger issue, of course, has to do with the  
15 arbitration. And if the -- theoretically, at least, the  
16 arbitration, if the Fifth Circuit agreed on the issue of  
17 arbitration, then the argument would be that we would -- that  
18 in the arbitra... well, it is true to say that -- well, I  
19 think I'm kind of getting ahead of myself here.

20 Q You are, just a bit. Let's just focus on the confirmation  
21 appeal. That's been consolidated for oral argument purposes  
22 --

23 A It has.

24 Q -- with the appeal of the involuntary; is that right?

25 A That's correct.

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1 Q Okay. And just to sum up this piece of it, did Foley  
2 represent the Debtor with respect to all of the underlying  
3 proceedings?

4 A It did.

5 Q And why does the Board believe it's in the Debtor's best  
6 interest to retain Foley to conduct the oral argument and to  
7 finish up this proceeding?

8 A Well, first of all, I think the Court would agree with me  
9 that Foley is a very competent law firm. It's competent to do  
10 the work that they've been charged to do.

11 Second, pretty much all the work on the appeal is already  
12 in the can. The only thing that's left to be done at this  
13 point in time is to make the oral argument. Obviously, if we  
14 didn't go forward with the Foley firm, we'd have to find  
15 somebody who could make the argument. So, we would -- but we  
16 would lose the benefit of Foley's experience that they have in  
17 the case so far.

18 I think there will be a cost element that would be  
19 associated with bringing somebody new up to speed with respect  
20 to this.

21 So, those, generally speaking, are the benefits that we  
22 see.

23 Q Okay. Let's turn then, finally, to the Neutra appeal. Do  
24 you have a general understanding of that matter for which the  
25 Debtor seeks to retain Foley?

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1 A Yeah. The Neutra appeal, what happened in Neutra is that  
2 Neutra, to my understanding, moved to intervene in the  
3 involuntary proceeding. I think that intervention was denied.  
4 And so that appeal has to do with the fact that Neutra  
5 contends that it should have been permitted to intervene, that  
6 the matter of collections should have been arbitrated.

7 I think that one of the issues in there is this -- in that  
8 appeal is who decides on the issue of arbitrability. Is it  
9 this Court, or is it the arbitrators themselves?

10 So, those are the issues that are present in the Neutra  
11 appeal.

12 Q Okay. Is the Debtor named a party to the appeal?

13 A The Debtor is not a named party in the Neutra appeal.

14 Q But the Board nevertheless wants to retain Foley on a  
15 post-petition basis to prosecute that appeal; is that right?

16 A That's correct.

17 Q And why is that?

18 A Well, I think both -- we recognize and I think the Fifth  
19 Circuit recognizes as well that these two things, that these  
20 two appeals kind of go hand-in-glove. The 1129(a)(3) argument  
21 basically is dependent upon the arbitration issue, which is  
22 fleshed out in the Neutra appeal.

23 And so, at the end of the day, the way that the Board sees  
24 this is that the Debtor is the most immediate beneficiary of  
25 the economic benefit of the Neutra appeal. We see the

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1 possibility of an income stream there. We see the possibility  
2 of the ability to pay our claims in the Acis case. And I  
3 think -- one of the things I think that is of particular focus  
4 when it comes to all of this litigation is the fact that, as I  
5 understand it, Mr. Terry started out with an \$8 million claim,  
6 and I think he bid \$1 million of that claim for the interest  
7 that he got in Acis, which reduced it, say, to \$7 million.  
8 And I think Mr. Terry's interest now over time I believe it's  
9 been reduced to somewhere between \$4 to \$6 million. So  
10 that's, that's a claim.

11 But in this case, Mr. Terry has filed a proof of claim for  
12 \$70 million. And my understanding from our visit with Mr.  
13 Terry and his counsel is that that claim could get up to \$300  
14 million. And so, as a board, we look at that and what we're  
15 concerned about is the migration, the alleged migration of a  
16 tremendous amount of value from Highland down to Acis. So, at  
17 the end of the day, it doesn't really matter who you regard as  
18 the ultimate equity owner of Acis, whether it's Mr. Terry or  
19 whether it's Mr. Dondero: The migration of that value  
20 downstream to Acis is of no real benefit to Highland Capital  
21 at all.

22 Q Is this one of the issues that the Board discussed with  
23 the Committee last week in connection with this motion?

24 A Yes. It is.

25 Q Okay. And let's just go back to the income stream for a



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1 second. The income stream that the Board is hoping it will  
2 get if the decision is reversed, is that income stream derived  
3 from the two agreements that we just looked at?

4 A It is.

5 Q So those are the two very agreements that the Board would  
6 look to have reinstated if it were to succeed on the appeal;  
7 is that right?

8 A Yes.

9 Q Now, does the Board know exactly the form of relief the  
10 Fifth Circuit is going to grant?

11 A I have no earthly idea.

12 Q Right? But has the Board made a determination that the  
13 outcome of Neutra obtaining control of Acis is one  
14 possibility?

15 A It's certainly a possibility.

16 Q And is that the potential benefit that the Board focused  
17 on in deciding to pursue this motion?

18 A Yes. I mean, I'm glad to adopt the percentages that Mr.  
19 Terry's counsel has mentioned today. I guess if the cost-  
20 benefit analysis is that we're going to pay a couple hundred  
21 thousand dollars here to get to the end of the road, and the  
22 benefit is millions of dollars, well, even if our chances are  
23 only ten percent, I think that's a shot worth taking.

24 Q Thank you very much. If the Fifth Circuit reversed,  
25 because this is a point that was also made in the Acis

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1 opening, what would happen to Mr. Terry's claim? Or what's  
2 your understanding or what's the Board's view as to whether or  
3 not it would intend to satisfy Mr. Terry's claim?

4 A I know, speaking on my behalf, that I'd -- the claim that  
5 Mr. Terry got through arbitration I regard as a valid claim.  
6 I think it's one that would have to be addressed no matter who  
7 is in charge of paying the obligations of Neutra.

8 Q Has the Board concluded that it's in the Debtor's best  
9 interest to retain Foley for the purpose of prosecuting the  
10 Neutra appeal, or at least in issuing the oral argument?

11 A Yes.

12 Q Okay. And when is the argument scheduled for?

13 A March the 30th.

14 Q And is the fact that that's all that's left with respect  
15 to this aspect of the engagement a factor that the Board took  
16 into account in its decision?

17 A Yes.

18 Q Has the Board reached a decision as to who the real  
19 economic party in interest is with respect to the Neutra  
20 appeal?

21 A Yes. We believe ultimately that our Debtor would bear the  
22 most economic interest in the outcome. And, really, because  
23 of the amount of the obligations that are owed, both to Mr.  
24 Terry, to Highland Capital, by the time that you have this  
25 kind of runoff of all the revenue streams, I'm not really sure

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1 that there would be anything left for either Mr. Dondero or  
2 Mr. Okada.

3 Q So, --

4 A That's -- that's a view from 50,000 feet, not even 30,000  
5 feet.

6 Q Okay. Well, let's talk about the specific benefits,  
7 potential benefits, if it's reversed on appeal. Does the  
8 Board believe it's possible that the two contracts get  
9 reinstated?

10 A It is possible.

11 Q And is that a motivating factor in supporting this motion?

12 A It is.

13 Q What would happen to the \$8 million claim that the Debtor  
14 has against Acis right now in the Acis bankruptcy? Does the  
15 Board have a view as to what would happen to that?

16 A It would be our aspiration to collect that claim on behalf  
17 of our client, which is Highland Capital Management.

18 Q And would -- is it the Board's expectation that if it was  
19 in that position it would get paid hundred-cent dollars,  
20 rather than at least a portion of it as a general unsecured  
21 claim?

22 A Again, that would be our aspiration.

23 Q Uh-huh. What would happen to the adversary proceeding?  
24 Do you have an understanding as to what would happen in the  
25 adversary proceeding with respect to Mr. Terry if the Fifth

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1 Circuit reverses and Neutra regains control of Acis?

2 A Well, I'm assuming -- I'm assuming that that adversary  
3 proceeding would go away.

4 Q Okay. And would that -- is that a potential benefit to  
5 the estate?

6 A That would be a benefit to the estate if it did.

7 Q And do all of the factors that we just discussed go into  
8 the cost-benefit analysis that the Board did in deciding to  
9 pursue only these three very limited aspects of the  
10 engagement?

11 A Yes.

12 Q Okay. Has the Board considered the potential harm to the  
13 Debtor if the motion is denied?

14 A We have.

15 Q And have -- can you share with the Court the issues that  
16 the Board has identified as potentially being adverse if the  
17 motion is denied?

18 A It's really just the other -- the flip side of the coin of  
19 benefit, which is added expense, loss of the experience that  
20 the Foley firm has, perhaps delay of time in finding somebody  
21 else, bringing them up to speed, not just with respect to the  
22 two appeals but with respect to the proof of claim. And there  
23 may be others that I'm not thinking of right now.

24 Q Did the Board consider the potential loss of the  
25 institutional knowledge that Foley has and the potential

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1 adverse impact it would have on the quality of the oral  
2 argument?

3 A It did.

4 Q Okay. So, two of the three matters that the Debtor seeks  
5 to retain Foley for are appeals to the Fifth Circuit; is that  
6 right?

7 A Yes.

8 Q And did those matters originate in this courtroom?

9 A They did.

10 Q And you were colleagues with Judge Jernigan at one time,  
11 weren't you?

12 A Yes. We were bench colleagues for twelve years.

13 Q And do you believe Judge Jernigan is a good judge?

14 A I do.

15 Q Do you believe she's a fair judge?

16 A I do.

17 Q Do you believe she tries to get it right every single  
18 time?

19 A I know she tries to get it right every time.

20 Q So then why is the Board seeking to prosecute these  
21 appeals of Judge Jernigan's decision?

22 A Well, it's in the best interest of our client to do that.  
23 And I have not -- I have to say there's always a little bit of  
24 discomfort that comes with something like this, but I do know  
25 this from my time on the bench, and that is that when you take

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1 the job that Judge Jernigan has, you take it with full  
2 understanding of how the system works. And in the system,  
3 half the people lose at any one given time. And when you  
4 lose, you tend to be disappointed in the result, and the  
5 result of that is that you get the right to go to the next  
6 court and have someone say that the judge got it wrong.

7 So those of us that take the bench understand that that's  
8 the system, and I don't think -- for the most part, we're not  
9 threatened by that. And so I, you know, as uncomfortable as  
10 this may -- this may put -- a position it may put me in from  
11 time to time, I think that -- I think Judge Jernigan  
12 understands the roles that we all play in this system. And so  
13 --

14 Q Just, okay, just to summarize: If the motion is granted,  
15 what's the absolute worst-case scenario here for the Debtor?

16 A I'm sorry. Would you say that again?

17 Q If the motion is granted and the Debtor is allowed to  
18 retain Foley for the three tasks which you have described, do  
19 you have an understanding as to what -- what's the worst that  
20 could happen? They'd have to pay Foley's fees, right?

21 A We'd have to pay -- well, subject to Judge Jernigan's  
22 approval, --

23 Q Right.

24 A -- those fees would be paid.

25 Q And subject to everybody's opportunity to object, right?

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1 A Right.

2 Q But if the fees were paid at a hundred percent, nobody  
3 objected and Judge Jernigan approved of them, what's the  
4 maximum exposure that the Debtor has from this?

5 A I think Foley has about \$311,000, I believe, right now in  
6 time. And I think they would probably have about maybe  
7 another \$100,000 more. And I know -- I hate to scoff at the  
8 notion that \$400,000 is a lot of -- is not a lot of money.  
9 But, you know, in the grand scheme of things in this case,  
10 it's -- I won't say it's a rounding error, but it's not a lot  
11 of money.

12 Q And forget about, I mean, not forget about, but in  
13 addition to its relative size to the overall case, how does  
14 that compare to the relative economic benefit that the Debtor  
15 believes it will recover if the appeal is successful?

16 A Well, I think the cost is -- the cost is less than half a  
17 million, and the potential benefits are in the millions.

18 MR. MORRIS: Okay. Just one moment, Your Honor, if I  
19 may?

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: All right. Just a few more questions,  
23 Your Honor.

24 THE COURT: Okay.

25 BY MR. MORRIS:

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1 Q Mr. Nelms, did Neutra pay a portion of the fees, Foley's  
2 fees prior to the petition date in connection with an April  
3 litigation? Do you know?

4 A If they did, I'm not aware of it.

5 Q Okay. Do you know what would happen to the appeal if  
6 there was no funding for the appeal?

7 A Well, I think I know what the result of the appellant not  
8 showing up for an appellant argument would be.

9 Q And what would that be?

10 A Well, I think that would be a pretty quick resolution.

11 Q Do you think the case would be dismissed, the appeal would  
12 be dismissed?

13 A I think so.

14 Q And would that be the loss of a potential material benefit  
15 and asset of the Debtor's estate?

16 A It would be.

17 Q Can you think of any way to ensure the appeal is  
18 prosecuted today other than making sure the Debtor funds it?

19 A I'll put it this way. I think the most certainty can be  
20 added to this case by having the Debtor fund this matter  
21 through the end of March.

22 Q And from --

23 A I think that's -- that's -- for the time being, that's the  
24 easiest, most simple path.

25 Q And you say for the time being. Has the Board reached an



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1 agreement to never request, from Neutra or anybody else,  
2 contributions for the funding of this case?

3 A No. Ultimately, there is going to be at some point in  
4 this case a settling of accounts between the Debtor and Mr.  
5 Dondero, just as there are -- will be a settling of accounts  
6 between the Debtor and other parties in interest. We, as the  
7 Board, have just chosen not to have that fight today.

8 Q And why did the Board reach that decision?

9 A Because we just thought it was in the best interest of the  
10 Debtor to proceed that way.

11 Q And is that because you need this appeal argued on March  
12 30th?

13 A It is.

14 Q And that's because of all of the potential benefits that  
15 you've identified; is that right?

16 A Right.

17 Q Okay.

18 MR. MORRIS: I have no further questions, Your Honor.

19 THE COURT: Okay. Cross?

20 MR. LAMBERSON: Yes, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. LAMBERSON:

23 Q Good morning, Mr. Nelms.

24 A Good morning.

25 Q How's it to be on that side of the bench?

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1 A Not so fun.

2 Q It's not great, right?

3 MR. LAMBERSON: And Your Honor, we have an exhibit  
4 notebook, which we're not -- we're not going to use all these  
5 exhibits. We actually -- you'll notice that there are some  
6 empty tabs in here. We downsized the exhibits from the  
7 exhibit list, and I'm not going to use all these. So I'll  
8 just introduce them as I get to them.

9 THE COURT: Okay.

10 BY MR. LAMBERSON:

11 Q Let me pick up on your last point.

12 MS. CHIARELLO: Your Honor, may we approach? We have  
13 binders.

14 THE COURT: You may.

15 BY MR. LAMBERSON:

16 Q So, let me pick up on your last point, Mr. Nelms. So, who  
17 -- who owns Neutra?

18 A Well, if you follow the stream all the way up, it is owned  
19 75 percent by Mr. Dondero and 25 percent by Mr. Okada.

20 Q Okay. And Mr. Dondero is one of the richest men in  
21 Dallas. Correct?

22 A I don't know.

23 Q Presumably? Mr. Okada is also one of the richest men in  
24 Dallas?

25 A I don't know. I haven't lived in Dallas in 17 years.

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1 Q Okay. Fair enough. But they can't -- they can't pay the  
2 litigation costs for their own entity?

3 A Well, I don't know that they -- whether they can or  
4 whether they can't.

5 Q Right. So, are you familiar with an entity called  
6 Highland CLO Funding?

7 A Vaguely, yeah.

8 Q Okay. And Highland CLO Funding is one of the appellants  
9 in the appeal of the confirmation order, correct?

10 A That's correct.

11 Q Okay. And one of the issues on appeal is actually the  
12 plan injunction that's embedded in the confirmed plan,  
13 correct?

14 A That's correct.

15 Q Right. And is your understanding that that's really  
16 Highland CLO Funding's main appeal issue?

17 A I think it probably would be, yes.

18 Q Okay. And is there any reason that Highland CLO Funding  
19 can't pay Neutra's legal fees to have -- have another  
20 appellant in the Fifth Circuit?

21 A I don't know the answer to that question.

22 Q Okay. So, let me -- let me -- I'm going to try to keep  
23 this coordinated, but my notes are a little bit over the  
24 place, so I apologize in advance if I move around a little  
25 bit.

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1        So, you had testified earlier that -- and I'm just trying  
2        to synopsize your testimony -- that you -- that the Board  
3        believes the primary benefit of paying Neutra's legal expenses  
4        related to the order for relief appeal and the confirmation  
5        appeal is the income stream that would be evidenced by the  
6        sub-advisory agreement, right?

7        A     Yes.

8        Q     Okay. And I'm -- when I say sub-advisory agreement, I'm  
9        talking about this is the attachment to the Debtor's Exhibit  
10       4, which is the proof of claim.

11       A     Right.

12       Q     Right? And so it's your understanding that the way that  
13       works is Acis Capital Management, my client, is the portfolio  
14       manager for a bundle of CLOs, right?

15       A     That's my understanding.

16       Q     And that before the Acis bankruptcy, the sub-advisory  
17       agreement allowed Highland Capital Management to sub-advise  
18       those CLOs for a fee, correct?

19       A     That's correct.

20       Q     Okay. So, I'm going to focus on the confirmation appeal.  
21       So, you understand that the plan injunction prevents the  
22       liquidation of the CLOs and the Acis portfolio management  
23       agreement?

24       A     That is my understanding.

25       Q     Okay. And the reason that, frankly, we had to get the

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1 plan injunction is because HCLOF three times tried to  
2 liquidate, redeem the CLOs, including twice in the bankruptcy  
3 case?

4 A I understand that was an issue. But -- I have a general  
5 understanding as to what you're saying, but not a specific  
6 understanding. But I'm not disagreeing with you.

7 Q Yeah. Okay. And so if the plan goes away, the plan  
8 injunction goes away, then is there any reason to think that  
9 HCLOF isn't going to liquidate the CLOs?

10 A I would not know.

11 Q And in that case, there's not going to be any cash flow  
12 under the portfolio management agreements or the sub-advisory  
13 agreements, right?

14 A If you're asking me if that's a possibility, I'd say it's  
15 certainly within the realm of possibilities.

16 Q Okay. So, staying on the confirmation appeal, so let's --  
17 let's assume that, for whatever reason, the Fifth Circuit  
18 decides that the confirmation order needs to be reversed and  
19 they send it back down to Judge Jernigan and say, "Try again."  
20 Would you agree that that would effectively reactivate the  
21 Acis case?

22 A Well, I don't know, because, you know, one of the issues  
23 in the appeal is who gets to make the decision with respect to  
24 arbitrability. Because I know that it's the Appellants'  
25 position that the decision as to whether or not it should be

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1 arbitrated, something such as collections, should they go to  
2 be decided by the arbitrator, --

3 Q Let me stop you, just to be clear. I'm talking about the  
4 confirmation appeal, the appeal of the confirmation order.

5 A Uh-huh.

6 Q Right? Okay. I'm not talking about the order for relief  
7 appeal.

8 A I may be conflating the two, so I'm sorry.

9 Q Yeah, yeah, and I -- and it's -- yeah, it's -- but it is  
10 confusing. But I'm talking about the confirmation appeal. So  
11 the appeal of the Court's confirmation order confirming the --  
12 I think was the third amended plan. Okay? So, I'm focusing  
13 on that appeal only. If the Fifth Circuit says, "Nope. Try  
14 again," then you would agree with me that that effectively  
15 reactivates the Acis Chapter 11 case?

16 A Well, I think it depends. If you -- would you like me to  
17 explain why I think it depends?

18 Q Yeah. Go ahead. I don't -- because, I mean, honestly,  
19 I'm not exactly sure what happened, so I would actually -- I  
20 would like your opinion.

21 A Well, given that the first issue in the confirmation  
22 appeal is the issue of good faith, and the foundation of that  
23 pretty much is the whole arbitration issue, if the Fifth  
24 Circuit were to reverse on that basis, then I don't  
25 necessarily know that it would go back to the Bankruptcy

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1 Court.

2 If it was reversed just on the narrower issue with respect  
3 to the injunction, and maybe whether the injunction was too  
4 broad or something like that, --

5 Q Uh-huh.

6 A -- and that was the only basis for reversal, I would agree  
7 with you it would go back to Bankruptcy Court.

8 Q Okay. So there's some possibility that a result of the  
9 confirmation appeal is that the Acis Chapter 11 case is  
10 reactivated and we're back in front of Judge Jernigan on that  
11 case, too?

12 A That would be a possibility.

13 Q Okay. And then you'd get to talk with Mr. Phelan, right?  
14 That would be fun.

15 A Right.

16 Q So, so how much money did Highland Capital spend in the  
17 Acis bankruptcy case?

18 A I don't know.

19 Q Was it -- it was millions and millions, right?

20 A I don't know, but I'm -- I'm assuming it exceeded a  
21 million.

22 Q Okay. Well, aren't there -- aren't there claims of unpaid  
23 fees just in the Top 20 list, which we'll point to here in a  
24 minute, in the millions of dollars that relate to the  
25 attorneys that represented Highland in the bankruptcy -- in

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1 the Acis bankruptcy case?

2 A I don't know.

3 Q Okay. So, why, you know, assuming that a result of the  
4 confirmation appeal is that the Acis bankruptcy case is  
5 reactivated, how is that in Highland's best interest? And I'm  
6 not talking about Neutra, and I'm not talking about HCLOF.  
7 I'm talking about Highland.

8 A Well, the -- what would be in our best interest would be  
9 to once again control the sub-advisory agreement and to  
10 generate revenues for the benefit of this estate. Use those  
11 -- that revenue stream both to address any claims that  
12 Highland might have, as well as Mr. Terry. That would be the  
13 benefit as we see it.

14 Q Right. But by the time of the confirmation order, --

15 A But if your question is, oh, but you're going to be  
16 involved in a lot of other litigation and so how does that  
17 benefit, then I guess my answer to that is it's a -- my answer  
18 is a "Yes, but," and but may exceed the scope of your  
19 question, so I won't --

20 Q Okay.

21 A -- I won't give you the but answer unless you want me to  
22 do it.

23 Q That's fine. I just -- if we go back, if we go back to  
24 where we were before confirmation, I mean, I'm not talking  
25 about the order for relief, I'm talking about confirmation,



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1 the sub-advisory agreement had been terminated. Highland had  
2 been fired and Brigade was managing everything.

3 A Right.

4 Q So, there wouldn't be any cash flow going to Highland  
5 based on the -- just the reversal of the confirmation order.

6 A Well, what would have to happen, of course, is that Neutra  
7 would have to -- would have to appoint us as -- would have to  
8 allow us to come in under the sub-advisory agreement to  
9 perform those services.

10 Q Right. Except that there's a trustee, right? Robin  
11 Phelan was in charge of everything.

12 A Well, you're assuming there's still a bankruptcy.

13 Q Right. Yeah. Well, I am. I mean, again -- and maybe I'm  
14 being simplistic about this, but if the confirmation order is  
15 reversed, --

16 THE COURT: Counsel is standing. Do you have an  
17 objection?

18 MR. MORRIS: Yeah. I do, Your Honor, to this whole  
19 line of hypothetical questions. We do understand, I think  
20 everybody understands, that we don't know if the appeal will  
21 be granted. I think we do all understand that we don't know  
22 what the form of relief, the exact form of relief will be.  
23 But the testimony here is that the Board has decided that one  
24 possible form of relief is that -- is that Neutra will regain  
25 control of Acis and get these contracts reinstated, get the

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1 adversary proceeding dismissed, and get paid on its \$8 million  
2 claim.

3 If there's questions about that, I think it's relevant,  
4 but I don't know why we're spending a lot of time on  
5 hypotheticals with a fact witness.

6 THE COURT: But the --

7 MR. MORRIS: Not an expert witness.

8 THE COURT: The business judgment of the Board of the  
9 Debtor is at issue here, correct?

10 MR. MORRIS: Correct. Absolutely.

11 THE COURT: Don't these hypotheticals go to, is  
12 reasonable business judgment being exercised here?

13 MR. MORRIS: I think he has to lay a foundation and  
14 say, Is this -- is this a hypothetical you considered? Is  
15 this a hypothetical that you considered? Because we're just  
16 -- this is like expert testimony almost. There is no evidence  
17 that any of these factors were considered. And at the end of  
18 the day, there is no dispute that the scenario that the Board  
19 is saying is worth the investment, basically, is also a  
20 possibility.

21 THE COURT: Okay. I overrule the objection.

22 MR. LAMBERSON: Okay.

23 THE COURT: You can proceed.

24 MR. LAMBERSON: And Your Honor, I'm just about done.

25 THE COURT: Okay.

Nelms - Cross

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1 BY MR. LAMBERSON:

2 Q So, okay. So, we -- but we can agree that -- okay. Let  
3 me -- let me hopefully do this. Okay. So, I mean, I think  
4 that's fine for the confirmation appeal, so now I want to talk  
5 about the order for relief appeal. Right? So this is the  
6 appeal of the order for relief or the -- and I stated this  
7 earlier to the Court, but the sole substantive issue in that  
8 appeal is whether this Court should have compelled the order  
9 for relief to arbitration. Is that right?

10 A The sole substantive issue? I think, if you paint with a  
11 broad brush, yeah. I would agree with you, yes.

12 Q Okay. Well, and again, I'm not trying to --

13 A I know. So, --

14 Q I'm not trying to trap anybody. The three issues --

15 A And I'm not trying to be evasive, either.

16 Q Yeah.

17 A Yeah.

18 Q Are the standing issue, which, in my mind, isn't really a  
19 substantive issue. And then there's the issue about the  
20 arbitration of the order for relief. And then, finally, as I  
21 mentioned, we've raised a waiver argument that basically, if  
22 they had a right to arbitrate, which we think they don't, they  
23 waited too long to raise it. Right? Those are the three  
24 issues. Correct?

25 A That's correct.

Nelms - Cross

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1 Q Okay. So, let me ask you. And I'm not going to -- I'm  
2 not going to hold this against you at the Fifth Circuit level,  
3 but, I mean, do you -- do you think an order for relief is  
4 subject to arbitration?

5 MR. MORRIS: Objection, Your Honor. Calls for a  
6 legal conclusion.

7 THE COURT: Overruled.

8 MR. LAMBERSON: Sure it does.

9 THE COURT: Overruled.

10 THE WITNESS: I think the -- I think it's a -- I  
11 think there's a colorable argument.

12 BY MR. LAMBERSON:

13 Q Uh-huh.

14 MR. MORRIS: Objection withdrawn.

15 BY MR. LAMBERSON:

16 Q So you don't think *National Gypsum* and *Gandy* would apply  
17 to an involuntary petition and order for relief?

18 A Well, I'll put it this way. I guess they'll apply if the  
19 Fifth Circuit tells us they do.

20 Q Right.

21 A That's as much as I can tell you.

22 Q Okay. So, so if that ruling is reversed, right, as I  
23 mentioned earlier -- and let me ask you, actually, another  
24 thing. So, how often, when you were a judge, how often were  
25 -- I shouldn't say how often -- how many times were your

Nelms - Cross

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1 rulings reversed? Just roughly?

2 A Was I reversed?

3 Q Yeah.

4 A I think six.

5 Q Not very many claims, right?

6 A No.

7 Q So how many times was there a reverse and a render?

8 A I'm sorry. Say again?

9 Q How many times was there a reverse and a render, where  
10 nothing came back to you, that basically the higher court just  
11 said, It's done?

12 A Well, it was rendered every time except on one occasion,  
13 and that --

14 Q Uh-huh.

15 A -- *Stern v. Marshall* had just been decided, and so --  
16 gosh, I can't remember the district judge.

17 Q Okay.

18 A One of the judges reversed but sent it back to me to  
19 reconsider it under the light of the ruling in *Stern v.*  
20 *Marshall*, a jurisdictional issue. So, in all those instances,  
21 it was rendered.

22 Q Okay. So there was nothing -- there was no issue that  
23 came back to you? The case was just resolved?

24 A No. No issue came back to me.

25 Q Okay.

Nelms - Cross

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1 A No, you know what, there was a second one. I think the  
2 second one was *In re Mirant. Commerzbank versus -- MCAR v.*  
3 *Commerzbank*. That came back as well.

4 Q Right. Okay. So, again, but focusing on the order for  
5 relief appeal, one possibility is that the Fifth Circuit says,  
6 okay, this may be subject to arbitration, and sends it back to  
7 Judge Jernigan to make additional findings, apply a different  
8 standard, right? That's possible, right?

9 A That's possible.

10 Q Okay. So, in that case, nothing necessarily came out of  
11 the appeal, right? Like you're just basically back in front  
12 of her on the same issues?

13 A Well, I -- that may very well be the case, but --

14 Q Okay. Well, let's assume that the Fifth Circuit does  
15 reverse and render. Wouldn't -- isn't what they would render  
16 would be a -- compelling this case to arbitration? Right?  
17 Not that the bankruptcy goes away, disappears. It would  
18 basically be, "Should have been arbitrated. Go arbitrate."

19 A It's a good question, what the effect of reversing it  
20 would be and sending it back, remanding it. They -- I mean,  
21 one of the things that they might decide is to say that the  
22 whole issue of arbitration should be decided by an arbitrator.

23 Q Uh-huh.

24 A That's a possibility.

25 Q Right. But in that situation, the bankruptcy doesn't go

Nelms - Cross

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1 away. It just moves to a different forum, right?

2 A No, I mean, you're probably right. That, in and of  
3 itself, would not eviscerate the bankruptcy filing.

4 Q Uh-huh.

5 A That's true.

6 Q And so, in that situation, the result is -- and this is --  
7 that's, frankly, the best situation, is --

8 A But, of course, I mean -- can I go back to that? Just,  
9 I'm not sure about that. Because, after all, this was an  
10 involuntary petition.

11 Q Uh-huh.

12 A If it was a voluntary petition, then I would certainly  
13 agree with you wholeheartedly. Inasmuch as it was an  
14 involuntary petition, I'm not sure about the answer to that  
15 question.

16 Q Uh-huh. Okay.

17 A That's a good question.

18 Q But you would agree with me that a possible result of even  
19 a reversal of the order for relief appeal would just be more  
20 litigation?

21 A Yes. That's certainly a possibility.

22 Q Right. In this Court? Maybe in front of an arbitrator?  
23 Maybe both?

24 A Yes. That's possible.

25 Q Okay. All right. So, still focusing on the order for

Nelms - Cross

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1 relief appeal, but I want to go to this idea that, again,  
2 there's this cash flow stream that is going to be reinstated  
3 for the benefit of Highland Capital under the sub-advisory  
4 agreement. Okay?

5 A Right.

6 Q All right. So, before the Acis bankruptcy was filed,  
7 Dondero, and at that time, in control of Highland, were  
8 actually in the process of liquidating Acis, weren't they?

9 A Were they in the process of liquidating Acis?

10 Q Uh-huh.

11 A And I take it these are the transfers that were --  
12 concerning your client that prompted the filing of the  
13 involuntary petition itself?

14 Q Correct.

15 A Is that what you're referring to as the --

16 Q Yes.

17 A -- liquidation?

18 Q Yes.

19 A Well, I certainly know that -- I understand those  
20 transfers were taking place. Now, whether you'd call that a  
21 liquidation or not, I don't know, but I know what you're  
22 referring to --

23 Q Okay.

24 A -- and I think the answer to your --

25 Q So, --



Nelms - Cross

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1 A Yeah.

2 Q Yeah. So there were a variety of transfers of assets away  
3 from Acis before --

4 A Right.

5 Q -- the Acis bankruptcy filing, right? And, actually, are  
6 you aware that there was actually an agreement between  
7 Highland CLO Management and Acis to transfer those PMAs to  
8 HCLOF Management?

9 A No, I'm not aware of that.

10 Q Okay. And as we talked about earlier, HCLOF repeatedly  
11 attempted to redeem the CLOs, even during the Acis bankruptcy,  
12 right?

13 A I read about that in Judge Jernigan's opinion, so I'm  
14 assuming that's the case.

15 Q Right. Okay. And then -- and, in fact, if HCLOF was  
16 successful, that would liquidate the CLOs and it would  
17 effectively terminate the Acis portfolio management  
18 agreements, right?

19 A I don't know.

20 Q Okay. But if that was the case, if the portfolio  
21 management agreements went away or no longer had assets to  
22 manage, then the sub-advisory agreement would have no income,  
23 right?

24 A If you're asking me if that's something within the realm  
25 of possibilities, I suppose so.

Nelms - Cross

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1 Q Okay. So, if, because of the appeal, the Acis bankruptcy  
2 -- because of the order for relief appeal, if the bankruptcy  
3 -- if the Acis bankruptcy just went entire away, just  
4 disappeared, right, so Mr. Dondero would be in control of  
5 Acis, not you, right?

6 A He would be in control. That's correct.

7 Q Okay. And so if he wanted to terminate the PMAs and enter  
8 new PMAs with Dondero Capital Management, you couldn't keep  
9 him from doing that, could you?

10 A Well, I -- no, I could not keep him from doing that.

11 Q Okay. Or if he wanted to terminate the sub-advisory  
12 agreement and enter into a different agreement, I mean, you  
13 couldn't keep him from doing that, either, could you?

14 A No, I couldn't.

15 Q Right. So what makes you think that Highland Capital  
16 Management, a debtor that he lost control of, just like Acis,  
17 would benefit from Acis's PMAs, when he was actively trying to  
18 take Acis's PMAs away from Acis?

19 A Well, I have -- I spoke to Mr. Dondero about this, and he  
20 -- I asked him the question, and he said that he would  
21 reinstate Highland under the sub-advisory agreement and the  
22 shared services agreement.

23 Q Okay. So, on that point, you did mention earlier that, as  
24 part of your -- as part of the Board's diligence, you talked  
25 with Mrs. O'Neil and you talked to Pachulski. Obviously,

Nelms - Cross

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1 you've analyzed the issues. I can tell you're familiar with  
2 all these, all of the pleadings. But you also talked with  
3 different Highland Capital employees about the litigation and  
4 the appeals, correct?

5 A I did.

6 Q Okay. Who did you talk with?

7 A Well, I have to say that the interaction with Highland  
8 employees was actually fairly abbreviated.

9 Q Uh-huh.

10 A We spoke very, very briefly about this with Isaac Leventon  
11 on the day that we were appointed. I don't know if the Court  
12 is aware of this or not, but we spoke about it very briefly,  
13 and then he was injured later that night and he really hasn't  
14 been back at the office since then. So, --

15 Q Oh.

16 A -- I would say, for the most part, I have relied mainly on  
17 Pachulski.

18 Q Okay. But you did indicate you talked to Mr. Dondero as  
19 well?

20 A I talked to him about this issue about reinstatement, yes.

21 MR. LAMBERSON: So, Your Honor, I'd like to turn to

22 --

23 THE WITNESS: Oh, you don't have to call me Your  
24 Honor.

25 THE COURT: There are two Your Honors.

Nelms - Cross

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1 MR. LAMBERSON: Your Honors. How about that?

2 THE COURT: Okay.

3 THE WITNESS: Yeah, there's only one judge in the  
4 court today.

5 BY MR. LAMBERSON:

6 Q Could you turn to Exhibit 16, please? This is Acis's  
7 Exhibit 16. I'm sorry. Do you have that, Mr. Nelms?

8 A I do.

9 Q And could you identify Acis Exhibit 16?

10 A Yes. This is Official Form 204 in the current case, the  
11 one we're here for today.

12 Q Right. So it's the Top 20 List of Creditors for Highland  
13 Capital Management?

14 A Yes, that's correct.

15 Q Okay. And have you seen Exhibit 16 before?

16 A Pardon me?

17 Q Have you seen Exhibit 16 before, the Top 20 List?

18 A No, I have not seen it before.

19 Q Okay.

20 MR. LAMBERSON: Your Honor, we'd ask for the  
21 admission of Exhibit 16.

22 THE COURT: Any objection?

23 MR. MORRIS: Just on relevance grounds. Can we at  
24 least establish a foundation as to which element of 327(e)  
25 this goes to?

Nelms - Cross

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1 THE COURT: Response?

2 MR. LAMBERSON: Well, Your Honor, what I'm going to  
3 point out is that the top ten creditors, other than an insider  
4 creditor, are all litigation-based, and that the, as I pointed  
5 out in my opening, the origin of this case was a bad  
6 litigation strategy.

7 MR. MORRIS: No objection to the introduction of this  
8 exhibit for that limited purpose.

9 THE COURT: All right. It's admitted.

10 (Acis Capital Management GP, LLC's Exhibit 16 is received  
11 into evidence.)

12 BY MR. LAMBERSON:

13 Q All right. So, Mr. Nelms, you said you hadn't seen this  
14 before, but I think you'll probably be familiar with the  
15 information on it generally. So let's walk through this  
16 quickly. So, this is the Top 20 List of Creditors. The first  
17 creditor is Redeemer Committee, listed as litigation, do you  
18 see that, for about \$190 million?

19 A Yes.

20 Q And that's the arbitration award that precipitated this  
21 filing, correct?

22 A It is.

23 Q Okay. So the next claim is Pat Daugherty, litigation  
24 claim. It's \$11.7 million. Do you see that?

25 A Yes.

Nelms - Cross

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1 Q So, do you know what is Mr. Daugherty's history with  
2 Highland Capital? And try to keep it under five minutes.

3 A Yeah. Mr. Daugherty is a former employee. And I know he  
4 has some contractual disputes with the company based upon his  
5 separation.

6 Q Right. And he's a long-time litigant with Highland  
7 Capital, correct?

8 A He is, yes.

9 Q Yes. So the next one is CLO HoldCo. This is about \$11.5  
10 million. CLO HoldCo is an insider of the Debtor, correct? If  
11 you know.

12 A Is -- is it an insider? I don't know.

13 Q Okay. Well, Grant Scott, the party here, is Mr. Dondero's  
14 college roommate. Do you know that?

15 A That's my understanding, yes.

16 Q Okay. So, Creditor #4, McKool Smith, for two point --  
17 roughly \$2.1 million. Do you see this? This is for  
18 attorneys' fees incurred by Highland Capital, correct?

19 MR. MORRIS: Objection, Your Honor. I still fail to  
20 see how this is at all connected to any of the elements of  
21 327(e) or the retention of Foley.

22 THE COURT: Okay. I overrule.

23 BY MR. LAMBERSON:

24 Q So, this is -- this -- these are fees incurred by Highland  
25 Capital, you know, a variety of venues, right, including this

Nelms - Cross

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1 one, state court fights against Mr. Terry, right?

2 A I thought -- McKool Smith, I thought they were involved in  
3 the Redeemer litigation, but they may be involved in other  
4 litigation as well.

5 Q Okay. Fair enough. And do you know, this claim is  
6 disputed by the Debtor, correct?

7 A Yes.

8 Q Okay. And do you know, obviously subject to the stay, but  
9 do you know if this claim is being arbitrated or has been sent  
10 to arbitration?

11 A No, I don't know any -- no, I don't know.

12 Q Okay. That's fair enough. So, then #5 -- I'll move it  
13 along here. Meta Discovery, Meta-e Discovery, they're a  
14 litigation vendor, right?

15 A I'm sorry, would you ask your question again?

16 Q Meta-e Discovery, the next creditor. They're a litigation  
17 vendor and they provide litigation support services?

18 A I don't know what they do.

19 Q Okay. Fair enough. Foley Gardere. Obviously, that's the  
20 law firm you all are seeking to have engaged. DLA Piper.  
21 This relates to fees incurred in connection with the Terry  
22 arbitration award, correct?

23 A I think so.

24 Q Okay. Reid Collins. These are fees related to the UBS  
25 lawsuit, correct?

Nelms - Cross

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1 A I don't know.

2 Q Okay. Josh and -- Joshua and Jennifer Terry. This is a  
3 litigation claim, right? This is -- this is an IRA claim,  
4 right?

5 A It is.

6 Q NWCC. This is also a litigation claim? In other words, a  
7 litigant fighting with Highland?

8 A I can only intuit that just because of the fact that it's  
9 a law firm.

10 Q Okay. Fair enough. So, out of the Top 20 -- or, out of  
11 the Top 10 Creditors, basically, they're all litigants or  
12 attorneys paid to fight litigants, with the exception of  
13 Dondero's college roommate. Right?

14 A With the exception of what?

15 Q Mr. Dondero's college roommate that has a claim based on  
16 some entity.

17 A Yes. They're -- they all have some nexus to litigation.

18 Q Okay. And let me just ask you: If you were able to  
19 completely set aside all of Highland Capital's litigation  
20 issues, right, just like -- just like the concept of the order  
21 for relief appeal makes the Acis bankruptcy go away forever,  
22 if you could snap your fingers and make all of Highland's  
23 litigation go away forever, would Highland have any financial  
24 problems at all?

25 A Well, I don't know that I know the answer to that, but I



Nelms - Cross

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1 -- but it's certainly to say that litigation up to this point  
2 has been the driving force behind its bankruptcy filing.

3 Q Okay. Fair enough. Okay. So, Mr. Nelms, would you turn  
4 -- could you turn to Acis Exhibit 27?

5 A Okay.

6 Q Do you have that?

7 A I do.

8 Q Okay. And can you identify Exhibit 27?

9 A Yes. My understanding is that this was the lawsuit that  
10 was filed by the DAF and CLO HoldCo in the Southern District  
11 of New York.

12 Q Okay. And so I had mentioned this in my opening, and I  
13 believe counsel had asked you about what we call the DAF  
14 litigation. Is this the complaint that's the basis of the DAF  
15 litigation?

16 A Yeah, that's my understanding. It is.

17 Q Okay. And I think you had testified earlier that the  
18 board was actually shown a copy of this complaint, was before  
19 it was filed, and --

20 A I wouldn't call it -- I'm sorry, go ahead, ask your  
21 question.

22 Q No, no, I -- that's fine.

23 A I wouldn't call it a board presentation. I just remember  
24 it being handed to Mr. Dubel and Mr. Dubel looking at it,  
25 asking what it was, and saying, Tell them not to do this.

Nelms - Cross

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1 Q Okay. Thank you. And -- but it's your understanding that  
2 the complaint was filed anyway?

3 A It is my understanding it was filed later.

4 Q Okay. And in fact, this has a file-stamp at the top,  
5 which I'm sure you're very familiar with. Correct? Has a  
6 PACER file-stamp at the top.

7 A Right.

8 Q Right.

9 MR. LAMBERSON: So, Your Honor, we'd ask for the  
10 admission of Exhibit 27.

11 THE COURT: Any objection?

12 MR. MORRIS: No objection.

13 THE COURT: Admitted.

14 (Acis Capital Management GP, LLC's Exhibit 27 is received  
15 into evidence.)

16 MR. LAMBERSON: And I'll be relatively quick.

17 BY MR. LAMBERSON:

18 Q I had mentioned in my opening that we -- I should say Acis  
19 was concerned that Highland Capital Management had some  
20 participation in this, and I probably should have been clearer  
21 in saying that Highland Capital Management employees had some  
22 participation in Exhibit 27. Has the Board done any  
23 investigation as to whether any Highland Capital employees  
24 were involved in the preparation of Exhibit 27 or the filing  
25 of Exhibit 27?

Nelms - Cross

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1 A No, we have not. At least, let me speak for myself. I  
2 haven't done that investigation.

3 Q Uh-huh. And your counsel had mentioned that -- I believe  
4 this is correct -- your counsel had mentioned that you all had  
5 reached out -- the Board, I should say -- reached out to Grant  
6 Scott, who's the -- who's in control of the DAF as well as CLO  
7 HoldCo, and, you know, had sort of convinced them that it  
8 probably -- to dismiss this lawsuit. Correct?

9 A Yes.

10 Q Okay. And but do you -- as far as you know, it hasn't  
11 been dismissed yet?

12 A It hasn't been dismissed. There's some kind of technical  
13 things there, and I don't know if you want to go into them or  
14 not, but it hasn't been dismissed, but I have a high degree of  
15 certainty that this is going to get dismissed.

16 Q Okay. Fair enough. And are you aware that there was  
17 already a press release issued related to this lawsuit that  
18 was picked up by various CLO publications?

19 A When you say "already," are you talking about a specific  
20 time?

21 Q Well, that -- I guess what's I'm getting at is are you  
22 aware that the filing of this lawsuit has already resulted in  
23 various articles in CLO journals, periodicals?

24 A I'm aware of it having appeared in one publication.

25 Q Okay. And so is it fair to say that the damage is already

Nelms - Cross

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1 done and that, you know, dismissal of these claims probably  
2 isn't really all that -- isn't really all that significant  
3 when they've already, you know, put it in the press?

4 A I don't know if the damage has already been done or not.

5 Q Okay.

6 MR. LAMBERSON: Give me just a second, Your Honor.

7 THE COURT: Okay.

8 (Pause.)

9 BY MR. LAMBERSON:

10 Q So, there is actually one other -- there is one point.  
11 And I told you in advance that I was afraid I might be jumping  
12 around a little bit, so I'm going to jump around a little bit.  
13 Let me go back to the order for relief appeal. So, this is  
14 the appeal of the Court's order for relief that started the  
15 Acis bankruptcy.

16 One of the things you testified about related -- on your  
17 direct testimony is one of the benefits, one of the potential  
18 benefits, understanding we don't know what's going to happen,  
19 of the order for relief appeal is that if the -- if that  
20 ruling was reversed and the Acis bankruptcy went away, then  
21 the adversary would go away, the adversary between Acis  
22 Capital Management and Highland Capital Management. Correct?

23 A Well, yes. In my opinion, the adversary opinion -- excuse  
24 me, the adversary proceeding would go away. Would a lawsuit  
25 under TUFTA be avoided altogether by Mr. Terry?

Nelms - Cross

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1 Q Right.

2 A I don't know that it would take that away.

3 Q Okay. And that's -- you actually anticipated my question,

4 --

5 A Uh-huh.

6 Q -- which was: It's fair to say that, even if the

7 adversary went away between Acis and Highland Capital

8 Management, that the -- certain of the claims in the adversary

9 -- for example, the fraudulent transfer claims or derivative

10 claims -- would not necessarily go away because they could be

11 asserted by Mr. Terry as a judgment creditor, correct?

12 A They could, but the consequences of asserting that claim

13 outside of bankruptcy are vastly different than asserting them

14 inside of a bankruptcy case.

15 Q Uh-huh. Right.

16 A At least potentially.

17 Q And just to close the thought here, are you aware that one

18 of Acis's main arguments during the order for relief trial was

19 that we didn't need an involuntary, that Mr. Terry could just

20 go litigate all that stuff in state court?

21 A Yeah, I think so. I think I am aware of that. Yes.

22 Q Okay. So you'd agree with me that, even on your possible

23 day on the order for relief appeal, that doesn't make the --

24 what I'll call the Terry litigation, right, the judgment

25 litigation, go away?

Nelms - Redirect

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1 A No. No. The reversal on appeal would not necessarily  
2 make the Terry litigation go away.

3 Q Okay. Thank you.

4 MR. LAMBERSON: That's all I have, Your Honor.

5 THE COURT: All right. Redirect?

6 MR. MORRIS: I just have a few questions, Your Honor.

7 THE COURT: Okay.

8 REDIRECT EXAMINATION

9 BY MR. MORRIS:

10 Q Can you turn to Exhibit 16 in your binder, sir?

11 A Which one?

12 Q I guess it's the Acis exhibits.

13 A The Acis? Okay.

14 Q Yeah. The List of Top 20 Creditors.

15 A Okay.

16 Q You were taken through each and every one of those to make  
17 the point that they're largely litigation claims. Is that  
18 fair?

19 A Say again, please?

20 Q You were taken through many of those creditors to  
21 establish that --

22 A I was.

23 Q -- that the Debtor was involved in a lot of litigation; is  
24 that right?

25 A It was.

Nelms - Redirect

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1 Q Okay. And the Board was appointed on January 9th; is that  
2 right?

3 A Yes.

4 Q Did the Board have anything to do with any of the claims  
5 that are set forth in Exhibit 16?

6 A No.

7 Q Did the Board authorize the filing of any suits that are  
8 related to any of the claims that are set forth in Exhibit 16?

9 A No.

10 Q Did the Board direct the defense of any suits that were  
11 commenced against Highland with respect to Exhibit 16?

12 A No.

13 Q Okay. Has the Board been trying to diminish and eliminate  
14 litigation where it thought it was in the Debtor's best  
15 interests?

16 A It has.

17 Q And is that, for example, why the Board decided not to  
18 pursue the Winstead matter?

19 A It is.

20 Q Is that why the Board has used its efforts to try to  
21 thwart the DAF litigation?

22 A Yes.

23 Q Does the Debtor control DAF?

24 A The Debtor does not control the DAF.

25 Q Okay. Did the Debtor authorize -- withdrawn. Did the

Nelms - Redirect

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1 Board authorize the filing of the DAF complaint?

2 A It did not.

3 Q Did the Board know the DAF complaint was going to be  
4 filed?

5 A Well, I mean, I know Mr. Dubel was presented with a copy  
6 of the complaint. We had noticed that that document existed.  
7 But it came as somewhat of a surprise to us when it got filed.

8 Q It came as a surprise to you?

9 A It did.

10 Q Because that's not what was expected after Mr. Dubel said,  
11 Don't file it. Right?

12 A Right.

13 Q Okay. You were asked a bunch of questions on cross about  
14 different possibilities and results and potential orders from  
15 the Fifth Circuit on the assumption that the appeal was  
16 granted. Do you remember that?

17 A Yes.

18 Q And some of them were purported to be better or worse for  
19 the Debtor. Do you remember that?

20 A Yes.

21 Q If the appeal is not prosecuted, is there any chance that  
22 the contracts that the Board has focused on will be  
23 reinstated?

24 A No.

25 Q Is it fair to say that if the appeal is not prosecuted the



Nelms - Redirect

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1 chances of the Debtor recovering the tens of millions of  
2 dollars of revenue will be exactly zero?

3 A Well, I don't know that it's exactly zero, but severely  
4 diminished.

5 Q Yeah. How about getting paid a hundred-cent dollars on  
6 the \$8 million claim that's in the Acis litigation? If the  
7 appeal is not prosecuted, is there any chance that the Debtor  
8 is likely to recover hundred-cent dollars?

9 A Again, that possibility is severely diminished.

10 Q Uh-huh. How about with respect to terminating the  
11 adversary proceeding in the Acis litigation? If the appeal is  
12 not prosecuted, is there any possibility of that adversary  
13 proceeding just going away and being left with the arbitration  
14 that you've described?

15 A Again, a severely diminished possibility.

16 Q You mentioned that the \$8 million fraudulent transfer as  
17 part of an arbitration would be very different outside of a  
18 bankruptcy case. Do you remember saying that?

19 A I do.

20 Q Can you explain to the Court why you believe it would be  
21 different outside of a bankruptcy case?

22 A Well, it actually goes to a case that started in my court.  
23 This was the *MCAR v. Commerzbank* case in *In re Mirant*, and the  
24 issue in that case, *Mirant*, when it filed its petition in  
25 bankruptcy, was insolvent, but by the time that its bankruptcy

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1 concluded, Mirant was a solvent entity. And so all of its  
2 creditors were paid in full, but the trust that was  
3 established in the *Mirant* case brought some fraudulent  
4 transfer claims that were predicated on solvency, where these  
5 were constructively fraudulent as opposed to actual.

6 And so the question was, if all the creditors had been  
7 paid in full, is there standing to bring fraudulent transfer  
8 claims that would basically not benefit creditors but would go  
9 to equity?

10 I originally -- I ruled that there was no such -- that you  
11 couldn't bring such a cause of action, that the satisfaction  
12 of claims in full extinguished those claims. And I do recall  
13 that one of the interesting things about that case is that a  
14 lady named Elizabeth Warren wrote -- or proposed -- she  
15 submitted -- they submitted an expert opinion on her behalf,  
16 which I wouldn't let them file because I took the position  
17 that I was an expert, the expert in the Court.

18 And in any event, it turns out I wasn't the expert. I was  
19 reversed by Judge Means on that, who said that it's not  
20 limited. It went up to the Fifth Circuit, and the Fifth  
21 Circuit ruled the same thing.

22 So my takeaway from all of this is that, in a bankruptcy  
23 setting, as opposed to just a state court setting, that the  
24 potential recovery on account of fraudulent transfers is much  
25 broader, much more unlimited than it would be in the context

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1 of a state court lawsuit.

2 So, now, there may be things that would distinguish that,  
3 but that's something to be -- that's something to be troubled  
4 about if you're a director of this company.

5 Q And are these the types of things that, without, you know,  
6 just divulging privileged communications, are these the type  
7 of experiences and perspectives that you've shared with the  
8 other board members in the context of considering the various  
9 motions, the various matters for which Foley's retention is  
10 sought?

11 A Yes.

12 Q Okay.

13 MR. MORRIS: Just one second, Your Honor.

14 THE COURT: Okay.

15 (Pause.)

16 MR. MORRIS: Nothing further, Your Honor.

17 THE COURT: All right. Any recross on that redirect?

18 MR. LAMBERSON: No, Your Honor.

19 THE COURT: All right. Thank you, Mr. Nelms.

20 (The witness steps down.)

21 THE COURT: Any other evidence from Highland?

22 MR. MORRIS: Your Honor, we have had admitted our  
23 exhibits. Among those exhibits are two declarations from Ms.  
24 O'Neil, and so she's available in the courtroom today if  
25 anybody wants to cross-examine on those issues.

O'Neil - Cross

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1 THE COURT: All right. Well, I will accept those  
2 declarations as direct evidence. Any desire to cross-examine  
3 Ms. O'Neil?

4 MS. PATEL: Yes, Your Honor.

5 THE COURT: All right. Ms. O'Neil, we'll go ahead  
6 and swear you in on this today.

7 HOLLAND O'NEIL, DEBTOR'S WITNESS, SWORN

8 THE COURT: All right. Please be seated.

9 CROSS-EXAMINATION

10 BY MS. PATEL:

11 Q Good afternoon, Ms. O'Neil.

12 A Good afternoon.

13 Q Ms. O'Neil, do you concurrently represent both Highland  
14 Capital Management and Neutra, which is a Cayman entity,  
15 correct?

16 A Yes.

17 Q Okay. There are other entities that you either represent  
18 or have represented that are kind of affiliated or within the  
19 Highland umbrella; is that correct?

20 A Yes.

21 Q Okay. And that includes, for example, CLO HoldCo was one  
22 such representation. Isn't that right?

23 A Previous. Previously.

24 Q Okay.

25 A Not currently.

O'Neil - Cross

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1 Q Okay. So, and I believe you say that in your declaration,  
2 right, that you didn't -- that you no longer represent CLO  
3 HoldCo?

4 A Correct.

5 Q Okay. And when did that representation cease?

6 A It was -- it was very brief. I came into the case after  
7 the involuntary -- after the orders for relief were entered.  
8 And at that time, there had been the motion to intervene that  
9 included that entity, and it was determined to proceed with an  
10 appeal on that motion to intervene, or the denial of the  
11 motion to intervene, as well as the orders for relief.  
12 Actually, there was a compendium of orders that were appealed  
13 all at the same time.

14 And so, because that entity had also filed a motion to  
15 intervene, we had included that in the appeal. And at that  
16 time I was retained, but then by the time we kind of analyzed  
17 the issues, determined it was not necessary to proceed with  
18 that appeal, then I no longer represented that entity and  
19 disengaged.

20 Q Okay. But CLO -- to be clear, CLO HoldCo was actually an  
21 appellant for the order for relief appeal that we've been  
22 talking about today, correct?

23 A Initially, yes.

24 Q Okay. And it still remains an appellant; it just didn't  
25 file a brief in the involuntary appeal. Isn't that right?

O'Neil - Cross

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1 A It has not filed any brief. And I would have to look at  
2 the record if it even filed a notice to the Fifth Circuit. It  
3 did -- was included in the notice to the District Court. I  
4 just honestly can't recall if it was included in the -- in any  
5 notice to the Fifth Circuit.

6 Q Okay. And did you ever withdraw from your representation  
7 of CLO HoldCo in the District Court appeal?

8 A What do you mean, withdraw?

9 Q Well, I mean, you entered an appearance.

10 A You mean file a notice with the -- with the Court?

11 Q Right.

12 A I can't recall.

13 Q Okay. Ms. O'Neil, with respect to Neutra, you understand  
14 and you've heard testimony, and I believe it's in the  
15 declarations in support of the retention papers for Foley, and  
16 if you need to look at that I can direct you to the exhibit  
17 book, but it's -- is it your understanding that ultimately  
18 Neutra is owned 75 percent by Mr. Dondero and 25 percent by  
19 Mr. Okada?

20 A Yes.

21 Q Okay. And Ms. O'Neil, in connection with your  
22 representation of Neutra, who are the human beings that you  
23 interact with? Who directs your services?

24 A At -- currently? Are you --

25 Q Just on behalf of Neutra.

O'Neil - Cross

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1 A Predominantly, I get direction from Highland's in-house  
2 counsel.

3 Q Okay. And who would that be? Who are the people?

4 A The people are Mr. J.P. Sevilla, Mr. Isaac Leventon, Ms.  
5 Stephanie Vitiello. Those are the primary individuals that  
6 direct vis-à-vis Neutra.

7 Q Okay. Have you ever spoke with Mr. Dondero regarding your  
8 representation of Neutra?

9 A Yes.

10 Q Okay. And when was that? When was the last time?

11 A It has -- it's been a while. Certainly, it hasn't been  
12 since this bankruptcy was commenced. I think the last time I  
13 recall discussing that specifically is when we were together  
14 at the mediation during the course of the bankruptcy. And I'd  
15 have to look at my calendar. I can't recall exactly when that  
16 was.

17 Q Okay. And what about Mr. Okada? Have you -- when was the  
18 last time you spoke with Mr. Okada?

19 A I have never spoken with Mr. Okada.

20 Q During the course of your entire representation of Neutra,  
21 you've never spoken with Mr. Okada?

22 A That is correct.

23 Q Okay. And under -- do you have an understanding of under  
24 what authority Mr. Sevilla or Mr. Leventon or Ms. Vitiello  
25 would have to direct your legal services on behalf of Neutra?

O'Neil - Cross

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1 A Generally, yes, through the direction from the owners of  
2 Neutra.

3 Q Okay. That would be Mr. Dondero and Mr. Okada?

4 A Correct.

5 Q Okay. And it's your understanding, then, that Mr. Dondero  
6 and Mr. Okada have directed Highland's legal department to  
7 direct your services?

8 A Yes. Previously, yes.

9 Q Okay. Do you have -- is there a contract between Neutra  
10 and Highland, or --

11 A I don't know.

12 Q Okay. Did you ever ask if there was one?

13 A No, I did not.

14 Q Okay. In connection with your representation of Neutra,  
15 do you bill separately for the Neutra representation?

16 A Since the bankruptcy was -- since the Highland bankruptcy  
17 was commenced, we set up a separate task code to track the  
18 fees being incurred on the Neutra appeal. Prior to the  
19 bankruptcy, we did not have a reason to do that.

20 Q Okay. So let's talk about prior to the bankruptcy. I  
21 believe in your declaration it was disclosed that there were  
22 approximately \$2.1 million in billings relating to your  
23 representation of Highland, Neutra, and certain of the  
24 Highland Cayman entities: Highland CLO Management, Highland  
25 CLO Holdings, and HCF Advisor, amongst others. Right?



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1 A That sounds about right. I might want to look at the  
2 declaration just to confirm on the number, but that sounds  
3 about right.

4 Q Okay. Well, your declaration can be found under Tab 10.

5 A Okay. (Pause.) And are you referring to Paragraph 16?

6 Q Well, if you look at Page -- at the bottom, you'll see  
7 that there's page numbers, and it says Page 15 of 48. And  
8 this would be your declaration.

9 A Oh, thank you. I was looking at the --

10 Q Uh-huh. Paragraph 3.

11 A -- at the application, that's all. Correct. Yes. Thank  
12 you.

13 Q Firm-earned fees of two point -- roughly \$2.15 million,  
14 almost, correct?

15 A Yes.

16 Q Okay. And there's about \$1.4 million of that that was  
17 unpaid from the pre-petition period, correct?

18 A Correct.

19 Q Okay. And is it your testimony that, of the \$2.15 million  
20 in fees, that there was no apportionment between Highland,  
21 Neutra, and the Cayman defendants?

22 A Correct.

23 Q Okay. So, --

24 A Not -- not in my account -- not through my accounting  
25 processes. Obviously, the time entries, you could parse them

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1 out, if need be.

2 Q Okay. But you didn't keep your time necessarily that way,  
3 where they were already apportioned and parsed?

4 A Not under separate task codes, --

5 Q Okay.

6 A -- as we have done post-bankruptcy.

7 Q So, in connection with the billings that would have  
8 represented that \$2.15 million, were those bills submitted to  
9 Highland, to Neutra, to the Cayman defendants?

10 A They are submitted through an e-billing process that it  
11 goes through a Highland portal and -- in the aggregate. So  
12 they're submitted through that portal.

13 Q Okay. But the portal goes to Highland, correct?

14 A I do not know. I honestly -- our e-billing department  
15 handles it and I just know it goes through e-billing, an e-  
16 billing portal, and I don't know exactly. I'm assuming  
17 obviously it goes to Highland. They certainly get copies of  
18 it.

19 Q Okay. Did you or Foley ever submit a bill to Neutra?

20 A I mean, my understanding is that, going through the  
21 portal, we would go to the various parties that are affiliated  
22 with Highland.

23 Q Okay. But you've never directly sent a bill to Neutra for  
24 your representation of Neutra?

25 A As I said, it goes through e-billing, so that could be

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1 interpreted to go directly to them if it goes through an e-  
2 billing process.

3 Q Okay. But I'm asking, have you ever --

4 A I'm -- maybe I'm being hyper-technical, but I'm just --

5 Q Right.

6 A It's being submitted through --

7 Q I understand, but I just -- here's where I want to just  
8 direct us, is: Have you ever addressed a bill to Neutra, Ltd.  
9 care of either Mr. Dondero, Mr. Okada, or its formal business  
10 address?

11 A As I indicated, post-petition, we have been segregating  
12 them under a different task code and indicating it's Neutra.  
13 Pre-petition, it was all under the same invoice.

14 Q That was submitted to Highland only?

15 A Submitted through the e-billing process.

16 Q To Highland only, right?

17 MR. LAMBERSON: Objection to the form of the  
18 question. This has been asked about four times. The witness  
19 is very clear.

20 THE COURT: Overruled. I think she's trying to get  
21 an exact answer to her question, and she feels like she's not  
22 getting it. So, overruled.

23 THE WITNESS: Okay. Then I apologize, Your Honor.  
24 I'm not -- I just don't know technically, once it goes through  
25 the e-billing, how it's distributed on the other side. I

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1 just, I honestly --

2 THE COURT: I think the question is, to whom was the  
3 invoice directed?

4 THE WITNESS: In terms of the -- not where it was  
5 sent, but who it's directed to?

6 BY MS. PATEL:

7 Q Yes.

8 A It would have -- I believe it has the entities on it. It  
9 definitely has Highland on it for sure.

10 Q Okay. Does it have Neutra on it?

11 A Neutra is subject to the engagement letter, so it would be  
12 applicable to -- if our accounting department didn't  
13 technically put Neutra on it, that is not necessarily at any  
14 moment being -- as the engagement letter is -- was with all  
15 those parties. So I would have to look at the invoice, if it  
16 has all of the clients listed on there. I honestly -- I just  
17 can't remember right now.

18 Q Okay. Well, --

19 A We do have some post-petition invoices, and you'll see  
20 where they're segregated with Neutra.

21 Q You raise an interesting point. If Highland and Neutra  
22 and the other entities are all part of the engagement letter,  
23 is Neutra also liable for all of Highland's legal fees?

24 A I don't know the answer to that.

25 Q Okay. Is it your position that because Highland, Neutra,

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1 and the Cayman defendants are all part of the engagement  
2 letter, that Highland is responsible for Neutra's legal fees?

3 A From my firm's standpoint?

4 Q Yes.

5 A I think the, you know, our perspective is that they were  
6 -- we were primarily working for Highland, so the beneficial  
7 work, and as I think the Court knows, most of the work here  
8 was on behalf of Highland Capital Management. And it's in our  
9 engagement letter to that effect, effectively.

10 Q Sitting here today, Ms. O'Neil, post-petition, who's  
11 calling the legal shots for purposes of Neutra?

12 A The -- well, where we have been is the process with the  
13 Fifth Circuit. The Fifth Circuit schedule was already set  
14 pre-petition, and we have just been complying with the pre-  
15 petition -- or, rather, that schedule, which has rolled post-  
16 petition. And so our direction pre-petition has just  
17 continued in terms of proceeding with the briefing. And so,  
18 again, going back to who it was pre-petition, it's the same  
19 legal team giving instructions on behalf of Neutra.

20 Q Okay. And if the question were to be posed, for example,  
21 whether the Neutra involuntary or the order for relief appeal  
22 should be dismissed, for example, who would call the legal  
23 shots on that? Who would make the decision on that?

24 A To dismiss the appeal?

25 Q Yeah.

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1 A Not proceed with it up to this point? Despite where we  
2 are at this point, to just -- to just drop it?

3 Q Yes.

4 A It would be the owners of Neutra.

5 Q So that would be Mr. Dondero and Mr. Okada, right?

6 A Yes.

7 Q Okay. You -- Ms. O'Neil, were you in the courtroom when  
8 Mr. Demo or -- and Mr. Nelms -- when Mr. Demo made the opening  
9 statement and then when Mr. Nelms was testifying?

10 A Yes.

11 Q Okay. And you heard, again, the opening statement and  
12 then the testimony regarding the benefit to Highland of  
13 Highland paying for Neutra's legal fees in connection with the  
14 appeals, correct?

15 A I did hear that, yes.

16 Q Okay. All right. And can you, in your words, then,  
17 articulate, from your perspective as legal counsel to both  
18 entities, what the benefit is to Highland in this bankruptcy  
19 for Foley's representation of Neutra and Highland paying the  
20 bill for it?

21 A I just want to make sure I'm not, you know, getting onto  
22 attorney-client privileged discussions in terms of the  
23 benefit. I think I would agree with what has been stated in  
24 court today.

25 Q Okay. So, so, and just to kind of recap that, if I

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1 understand it, it's that if Neutra is successful in its appeal  
2 of the involuntary orders for relief and also its appeal of  
3 the confirmation order, then everything goes back and Highland  
4 gets this revenue stream, correct, of about \$12 million, plus  
5 it gets paid on an \$8 million, approximately, purported claim.  
6 Right?

7 A That the -- the agreements would be reinstated, which  
8 would then yield approximately that type of revenue stream as  
9 -- pursuant to the sub-advisor and sub-management agreements  
10 that were in place.

11 Q Okay. And one of the entities -- and I know that the  
12 retention application doesn't actually go to, anymore, Foley's  
13 representation of the Cayman entities, but -- that's kind of  
14 been put to the side. But you do -- and you do represent  
15 Highland CLO Management, correct, which is a Cayman entity?

16 A Correct.

17 Q All right. And it's one of the defendants in the Acis  
18 adversary proceeding, right?

19 A And that is the only engagement that we have for that  
20 party, is in conjunction with that adversary proceeding, which  
21 is stayed. So nothing is going on with that right now.

22 Q Well, I understand that, but you --

23 A Okay.

24 Q My question was, you represent Highland CLO Management,  
25 correct?

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1 A In that adversary proceeding.

2 Q Okay. So -- but you also represent it in connection with  
3 -- in -- generally with the bankruptcy as well, Acis's  
4 bankruptcy?

5 A There was no involvement until the adversary proceeding,  
6 until they were sued in the adversary proceeding.

7 Q Okay. And in the adversary proceeding, Highland CLO  
8 Management was sued for a few things, correct?

9 A In the adversary proceeding?

10 Q Yes.

11 A Yes.

12 Q Okay. Highland CLO Management, for example, received a  
13 \$9.5 million note that Acis was previously the holder of and  
14 that was transferred after Mr. Terry's judgment, correct?

15 A Are you asking if that was an allegation in the adversary  
16 proceeding?

17 Q Sure.

18 A I --

19 Q Right.

20 A That sounds right. That's been stayed, and I would have  
21 to defer to the -- obviously, the second amended complaint and  
22 the allegations therein. So, --

23 Q Okay. And are you aware that your client, Highland CLO  
24 Management, was also sued because it was to receive the  
25 portfolio management agreements under which Acis represents --



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1 or, I'm sorry, manages the Acis CLOs?

2 A That was -- that sounds like one of the allegations from  
3 that point in time.

4 Q Okay. So I guess let me -- let me ask you a slightly  
5 different way. Are you aware that there was a pre-petition  
6 agreement that was entered into and signed by Mr. Dondero that  
7 transferred the PMAs from Acis to Highland CLO Management?

8 A I cannot recall the -- all the evidence at the -- in  
9 conjunction with that at this time, but if that's one of your  
10 representations. I wasn't representing any of the parties at  
11 that time, but I do recall that there may have been some  
12 evidence presented in that regard. But I would have to look.  
13 It's been a long time. And that record is hundreds of  
14 thousands of pages. I would need to check back on that.

15 Q Okay. But if there were such an agreement, for example,  
16 that transferred the portfolio management agreements from Acis  
17 to another entity, a Cayman entity, can you agree with me,  
18 then, that Mr. Dondero's ownership interest in Neutra would  
19 really be of no import anymore because there wouldn't be a \$12  
20 million revenue stream anymore, would there, if Acis wasn't  
21 the portfolio manager of the Acis CLOs?

22 A I don't agree with the premi... at the end, when you said,  
23 if Acis isn't the CLO manager, then there would be no revenue  
24 stream from the CLOs if it's not reinstated as the -- as the  
25 manager.

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1 Q Okay. So you agree that if Acis isn't the portfolio  
2 manager of the Acis CLOs, there's no \$12 million revenue  
3 stream potential to Highland by virtue of Highland coming back  
4 in as the sub-advisor and shared services provider, right?

5 A Okay. Now, the -- no, I don't know that that's  
6 necessarily the case.

7 Q Well, why not?

8 A It could be appointed to be the sub-advisor, sub-manager  
9 for -- through a different entity.

10 Q Okay. So it would basically be -- but, again, going back,  
11 it would be through a different entity. Again, Mr. Dondero's  
12 ownership of Neutra would be of no import then, right?

13 A Perhaps I'm not understanding your question.

14 Q Well, --

15 A I -- it's a hypothetical, and I --

16 Q If Acis -- if Acis didn't have these portfolio management  
17 agreements, it doesn't matter if Mr. Dondero wins the Neutra  
18 appeal or not, right? Because he wouldn't have control of the  
19 Acis entity within which to redirect, through Acis, the sub-  
20 advisory and the shared services agreements, correct?

21 A He could direct it through another entity, as I think it's  
22 been well-discussed that Highland had -- Highland had the  
23 personnel to manage the CLOs. In fact, Mr. Terry was a  
24 Highland employee when he managed the CLOs. So he could  
25 certainly direct that management through another entity, even

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1 if it wasn't Acis. But vis-à-vis Neutra, Neutra would be --  
2 well, before the confirmation of the plan, Neutra owned Acis.  
3 So, vis-à-vis through Neutra, I believe your statement would  
4 be correct.

5 Q Okay. Ms. O'Neil, also as sort of a participant during  
6 the Acis bankruptcy cases --

7 MS. PATEL: And Your Honor, I know you're intimately  
8 familiar with all of these.

9 BY MS. PATEL:

10 Q But Ms. O'Neil, do you recall the multiple attempts during  
11 the bankruptcy case to effectuate what was called an optional  
12 redemption, which sought to liquidate the Acis CLOs?

13 A By HCLOF, I believe there were two instances, yes.

14 Q Okay. HCLOF executed those optional redemptions, correct?  
15 Mr. Bill Scott, one of the independent directors? Is that  
16 right?

17 A I believe the evidence was presented before the Court --

18 Q Okay.

19 A -- in that regard.

20 Q And during the course of the -- all of those proceedings  
21 with the optional redemptions, Highland was the ultimate  
22 advisor to HCLOF, was it not?

23 A I'm not sure I understand what you mean by the ultimate  
24 advisor.

25 Q Well, the technical contractual advisor was an entity by

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1 the name of Highland HCF Advisor, right? Is the portfolio  
2 manager for Highland CLO Funding?

3 A It has been a while since I looked at that org chart or  
4 those issues, so I do not recall off the top of my head.

5 Q Okay. Well, you said that you interacted, for example,  
6 with Neutra -- on your Neutra issues with JP Sevilla, Mr.  
7 Leventon, and Stephanie Vitiello, correct?

8 A Yes.

9 Q Okay. Wasn't it really, from a legal perspective, at  
10 least, Mr. Sevilla, Mr. Leventon, who were all advising  
11 Highland CLO Funding as well?

12 A I don't know the answer. You'd have to inquire of them.

13 Q So, is it your testimony, then, that Highland had nothing  
14 to do with the optional redemption notices that were issued  
15 during the course of the Acis bankruptcy cases?

16 A I'm not sure that I understand the relevance of that as to  
17 whether Highland had any -- had nothing to do with it. I  
18 think they were certainly involved and were aware. But they  
19 weren't the -- independently making those determinations.

20 Q Okay.

21 A As you know, Ms. Patel, there were directors that were  
22 involved. They testified before this Court. There -- HCLOF  
23 was represented by counsel as well. King & Spalding. So  
24 there were multiple parties involved.

25 Q Okay. So is it, again, your testimony that Highland had

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1 nothing to do with the optional redemption notices that were  
2 issued during the Acis bankruptcy case?

3 MR. MORRIS: Objection, Your Honor. It may be me,  
4 but I don't understand what this has to do with the Foley  
5 retention application.

6 THE COURT: Okay. We do seem like we're getting a  
7 little far afield. What's your response to that?

8 MS. PATEL: Your Honor, the contention has been made  
9 that if these bankruptcy appeals are somehow granted or in the  
10 District Court and this Court are reversed, --

11 THE COURT: Uh-huh.

12 MS. PATEL: -- that these cases are going to come  
13 back and that suddenly, magically, there's going to be a \$12  
14 million revenue stream flowing out of Acis back into Highland,  
15 and they're going to be able to collect on an \$8 million  
16 objected-to claim.

17 I'm just trying to get to how likely is that really to  
18 happen. I mean, given the course -- and again, I know Your  
19 Honor was a viewer of all of this -- of the multiple attempts  
20 to try to liquidate these assets, --

21 THE COURT: Okay. I'll allow the question, but it'll  
22 be the end of the line of questioning. Okay?

23 MS. PATEL: Understood. And Your Honor, just  
24 additionally, it's -- that's part of the appeal that Foley is  
25 handling on the confirmation appeal. As Mr. Nelms said, it's

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1 also based on the plan injunction.

2 THE COURT: All right. She can answer the question,  
3 but then we move on to another area.

4 MS. PATEL: Okay.

5 BY MS. PATEL:

6 Q So is it your testimony, Ms. O'Neil, that Highland had  
7 absolutely nothing to do with the optional redemptions --

8 A I did not --

9 Q -- during the bankruptcy case?

10 A That is not what I said.

11 Q Okay. So, -- and I get it. Highland CLO Funding is a  
12 different entity, and the Bankruptcy Court made findings with  
13 respect to the fact that it is controlled in every way by  
14 Highland. Do you recall that finding?

15 A Preliminary findings in conjunction with determining  
16 whether there was a likelihood of success on the merits. I do  
17 recall that --

18 Q Okay.

19 A -- those conclusions by the Court.

20 Q As a part of the bench memorandum in support of the  
21 confirmation order, correct?

22 A Yes.

23 Q Okay.

24 A Actually, I will -- I will -- I'll correct that. I'll let  
25 that -- the Court's order speak for itself. You may have said

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1 a few things that were more or less than what the Court's  
2 order said, so I'd just defer to what the Court's order said.

3 Q Okay. Well, part of the representation for Foley here is  
4 to represent Highland and Neutra in connection with the  
5 confirmation appeal, correct?

6 A Yes.

7 Q And part of that confirmation appeal is also -- one of the  
8 grounds there is that you're appealing the plan injunction,  
9 which the plan injunction is what stops the CLOs from being  
10 redeemed, correct?

11 A Correct.

12 Q Okay. So, how is Highland damaged by the plan injunction?

13 A I think it's fairly obvi... again, I want to not tread too  
14 much on attorney-client privilege. But, obviously, I have yet  
15 to have a client over my 30-plus years of practicing law that  
16 likes to be subject to any kind of injunction. It limits --  
17 that injunction is more than just on the -- it's a very broad  
18 injunction. So I'd like -- if I had the injunction in front  
19 of me, there's -- there's lots of restrictions under that  
20 injunction, and that is prejudicial to Highland to be able to  
21 act freely.

22 Q Able to act freely to liquidate CLOs?

23 A Among other things, as it may do in the ordinary course of  
24 business, in its opinion, that may be beneficial to his  
25 clients.

O'Neil - Cross

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1 Q Okay. Now, Ms. O'Neil, --

2 A If I may, may I add one more thing?

3 THE COURT: You may.

4 THE WITNESS: Okay. Highland, at least in that role,  
5 could not liquidate CLOs. So I think that was an improper  
6 statement. Or suggestion.

7 BY MS. PATEL:

8 Q Okay. Well, then, what specific actions that Highland  
9 would like to take is it being damaged by the injunction?

10 A I would need to look at the -- the injunction is very,  
11 very broad. So, anything that it can't do freely that is  
12 covered by the injunction is obviously a detriment to  
13 Highland.

14 Q Okay. Now, Ms. O'Neil, if you would turn to Tab 31 in the  
15 book, --

16 A All right.

17 Q -- please. And I will ask you, this is the declaration of  
18 Bradley Sharp that was in support of the order authorizing the  
19 retention of Foley Gardere. Have you had an opportunity to  
20 review this?

21 A Yes.

22 Q Any dispute with any of the statements in here?

23 A I don't recall having a -- I don't -- I think it was  
24 accurate, but --

25 Q Okay. Well, when you read it, did you have any disputes



O'Neil - Cross

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1 with the statements that were in here?

2 A I did not see it before it was filed, so -- but having  
3 read it after it was filed, I don't recall having any disputes  
4 with anything that was in it.

5 Q Okay. And I'll turn you specifically to Paragraph 13,  
6 which is found on Page 4 of 5.

7 A Okay.

8 Q And I'll -- well, let's look at this together. (reading)  
9 Prior to the petition date, the majority of Foley's and Lynn  
10 Pinker's fees and expenses were paid by a non-debtor entity,  
11 Highland CLO Funding Limited.

12 Do you see that?

13 A Yes.

14 Q Okay. And were Foley's bills sent to Highland CLO  
15 Funding?

16 A Yes.

17 Q Okay. And is -- were those bills separate and apart from  
18 the \$2.15 million that we talked about earlier that were  
19 remitted through the Highland e-billing system?

20 A Separate, yes.

21 Q Okay. About how much in fees has Highland CLO Funding  
22 paid to Foley to date?

23 A Nothing post-petition. Prior -- I mean, during -- from  
24 the inception of the representation of Highland, probably  
25 approximately -- over a million dollars, for sure.

O'Neil - Cross

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1 Q Over \$2 million?

2 A I do not believe it is over \$2 million. It's somewhere  
3 between \$1 and \$2 million.

4 Q Okay. And those separate matters that were billed to  
5 Highland CLO Funding, how did those differ from what was  
6 billed to Highland or to Neutra or to the Cayman defendants?

7 A If it was a matter that was clearly of some benefit to  
8 HCLOF, it was billed directly. Otherwise, there was an  
9 allocation billing for just the general work. And that was  
10 primarily through an indemnity agreement, as I understood it,  
11 between Highland and HCLOF.

12 Q Okay. And who did the allocation between Highland and  
13 Highland CLO Funding?

14 A I was instructed as to what the allocation should be or  
15 asked what I thought the allocation should be on any given  
16 time, and I believe it was the -- it was discussed with the  
17 board of HCLOF as to the allocation.

18 Q Okay. And who were you directed as to the categories of  
19 allocation by that you just referenced?

20 A You mean in terms of a person?

21 Q Yes.

22 A I most frequently discussed this with Mr. Sevilla, but  
23 also had conversations with Mr. Maloney, with King & Spalding,  
24 who was representing HCLOF, and occasionally would have direct  
25 conversations with Mr. Maloney and Mr. Scott and Ms. Bestwick,

O'Neil - Cross

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1 who were the two independent directors of HCLOF.

2 Q Okay. And what types of work generally either were  
3 allocated or apportioned or billed in full to Highland CLO  
4 Funding. What was the benefit there?

5 A The work was -- the work that was going on in the  
6 bankruptcy case.

7 Q Okay. But I -- I understand that it was work in the  
8 bankruptcy case because that's where Foley represented  
9 Highland and various other entities, but I'm asking you  
10 specifically: What types of categories, and I don't -- you  
11 don't have to go task by task -- but categories of work that  
12 you performed for Highland or Neutra or for the Highland  
13 Cayman defendants that benefited and were billed to Highland  
14 CLO Funding?

15 MR. MORRIS: Your Honor, I'm going to again assert a  
16 relevance objection to any of this post-petition stuff. This  
17 is an application to retain Foley on a post-petition basis  
18 for the benefits to this estate, not with respect to what  
19 happened on a pre-petition basis.

20 THE COURT: Your response?

21 MS. PATEL: Your Honor, there's been much discussion  
22 about what -- whether Neutra should have to pay this bill or  
23 whether it should not have to pay its own way here. This is  
24 -- this is, in my mind, a bit of an extraordinary application  
25 in that we're asking a debtor entity to pay for non-debtor

O'Neil - Cross

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1 representation.

2 I want to inquire as to sort of this jumbled mix of work  
3 that's been performed. There's -- clearly, Ms. O'Neil said  
4 she hasn't been paid by HCLOF post-petition, but I think we  
5 need to separate out all of these representations, who's  
6 controlling what, and how -- how these bills really should be  
7 paid.

8 THE COURT: How the allocation has worked --

9 MS. PATEL: Yes.

10 THE COURT: -- thus far?

11 MS. PATEL: Yes, Your Honor.

12 THE COURT: I overrule the relevance objection, but  
13 let me tell you a pickle we're getting into timewise. I have  
14 a confirmation hearing starting at 1:30. And we've gone three  
15 hours on this without a bathroom break. How much longer do  
16 you think you're going to need? Because we might have to stop  
17 and come back at 2:30 if you're going to need much longer.

18 MS. PATEL: Your Honor, I would say give me ten  
19 minutes and I can wrap it up.

20 THE COURT: Okay. Ten minutes.

21 MS. PATEL: Okay.

22 THE WITNESS: I'm sorry. What was the question? I  
23 apologize.

24 BY MS. PATEL:

25 Q I'm trying to remember it myself, Ms. O'Neil. The

O'Neil - Cross

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1 question was, what specifically -- what -- and I don't -- you  
2 don't have to go task by task. But categorically, what was  
3 the work that was performed that you would have billed  
4 directly to HCLOF?

5 A Prior to King & Spalding's involvement, you may recall  
6 that we were representing HCLOF as well. So there was direct  
7 bill for the work during the bankruptcy by Foley Gardere for  
8 specific work for HCLOF.

9 The -- the -- pursuant to the indemnification, as I  
10 understood it, although I never read the indemnification  
11 personally, that there would be an allocation between Highland  
12 to HCLOF for that, for work that they performed that was of  
13 benefit to HCLOF or its equity interest in the CLOs.

14 And so I was more directed as to what that allocation  
15 should be vis-à-vis the work that was going on. I think,  
16 generally speaking, because the CLOs were being impacted, as  
17 was well-discussed during the course of the Acis bankruptcy,  
18 by the issues in the bankruptcy, by the temporary injunction  
19 that were in place vis-à-vis their inability to seek an  
20 optional redemption during the course of the bankruptcy, that  
21 they were being significantly impacted by the actions in the  
22 bankruptcy, even though they were not specifically a creditor  
23 in the bankruptcy.

24 Q So you performed services on behalf of your client,  
25 Highland, that you then billed to Highland CLO Funding because

O'Neil - Cross

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1 Highland CLO Funding couldn't effectuate an optional  
2 redemption?

3 A It was -- it was in conjunction with the overall  
4 activities that were going on in the bankruptcy.

5 Q Okay.

6 A Not that specifically, no.

7 Q All right, Ms. O'Neil. I've only got a few minutes left.  
8 So let me ask you: Towards the end of January, did there come  
9 a time where you sent me an email regarding Acis's quarterly  
10 operating reports?

11 A Yes.

12 Q Okay. And you copied Mr. Hurst on that email as well,  
13 correct?

14 A Correct.

15 Q Okay. And your email was to say, hey, can we set up a  
16 time to talk because I've got -- Highland's got some questions  
17 about the quarterly operating report. Do you recall that?

18 A Yes.

19 Q Okay. And again, just so we're clear, this is around end  
20 of January 2020, right, after the appointment of the Board?

21 A Yes. You --

22 Q Okay.

23 A I think there's an exhibit. One of your exhibits is that.

24 Q There is. If you turn to --

25 A Or it's a portion of that email communication.

O'Neil - Cross

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1 Q It is. It's -- if you turn to Tab 28, this is sort of  
2 your initial email to me, correct?

3 A Yeah. This is not the entire email dialogue, because --

4 Q There were other emails afterward.

5 A -- I did not get a response and sent a couple of emails  
6 later, several days later, asking for a response.

7 Q Right. And I actually did respond to you after that,  
8 correct?

9 A Approximately a week later, yeah.

10 Q Okay. Because I was out sick, actually.

11 A Yeah. That's what you said.

12 Q Right. So, --

13 A You didn't say sick, but you were out, so it's okay.

14 Q Yeah. I was out. And so -- and I will tell you, I was  
15 sick. So I responded, albeit a little bit late, but I did  
16 respond to you and say, Ms. O'Neil, could you tell me what  
17 your questions are so that I can be prepared?

18 Does that sound about right?

19 A Yeah.

20 Q Okay.

21 A Yes.

22 Q And I never -- I never got a response to that. You never  
23 told me what your questions were with respect to the quarterly  
24 operating report, right?

25 A Yes. And I --

O'Neil - Cross

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1 Q Okay.

2 A I can explain that. Because Mr. -- I believe Mr.  
3 Pomerantz said that there was a meeting that was -- and they  
4 would discuss it then, so --

5 Q Okay.

6 A Or Mr. Demo. I'm sorry. Somebody from Pachulski told me  
7 that that would be addressed. Also, the status conference --  
8 I mean, the questions we had were because there was a February  
9 3rd status conference coming, and I wanted to see if we could  
10 get some clarity so that when we appeared before the status  
11 conference we could limit what we were going to be discussing  
12 with the Court, if anything.

13 Q Okay. Well, what were -- what were the nature of your  
14 questions? Because there was a conversation between Mr. Terry  
15 and myself and the Board and -- well, certain members of the  
16 Board. But what were your questions pertaining to?

17 A Oh, okay. Happy to discuss that. It's kind of awkward to  
18 have it in -- on this, in this --

19 Q On Q and A.

20 A -- forum, but --

21 Q I hear you.

22 A We sent -- as the Court will recall, the confirmation  
23 injunction can be lifted if all the claims are paid. So,  
24 since the plan, the Acis plan was confirmed, we have been  
25 tracking -- and the only way to track it is through the QORs



O'Neil - Cross

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1 -- what the revenues were coming in and what has been paid.  
2 And so -- in terms of expenses and then claims. And so we  
3 have been -- my paralegal has been tracking this.

4 As the Court may know from looking at the record, almost  
5 all of -- any other claims that were in the case were either  
6 disallowed or withdrawn. And so, really, the only claim,  
7 other than Highland's, was Mr. Terry's that was really left to  
8 be paid, other than administrative claims. And I believe the  
9 administrative claimants had agreed to deferral on some of  
10 their payments after the effective date.

11 So we had been tracking the payments, which you can track  
12 through the QORs, and it appeared that all of -- including Oak  
13 Tree's most recently allowed administrative claim -- that all  
14 of the administrative claims had been paid, and it appeared at  
15 least approximately a half of Mr. Terry's claim had been paid.

16 When you look at the QORs, it doesn't specifically say,  
17 "Here's who got what payment," but it shows the claims being  
18 paid down, in addition to just general expenses of the post-  
19 confirmation Debtor. And I'm -- this is taking a little bit,  
20 but in the disclosure statement to the plan, there had also  
21 been plan projections that set forth the revenues that were  
22 anticipated post-confirmation to pay the claims. And so  
23 likewise -- as well as the expenses, including to Brigade or  
24 just general operating expenses for Acis.

25 So, likewise, through the QORs, we had been comparing

O'Neil - Cross

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1 those against what was in the plan projection. And there were  
2 some things that weren't matching and we simply were having  
3 questions about the expenses seemed to be much higher.  
4 However, the claims were being paid down, so it looked like  
5 Mr. Terry was the only claimant left and was probably owed, by  
6 our calculation, around \$4-1/2 million, and that was the only  
7 thing left to be paid. And, but the revenues per the QOR was  
8 showing cash available of over five and -- \$5.3 million.

9 So, one of the things we wanted to discuss was the  
10 application of using the cash to go ahead and pay down what  
11 was left of Mr. Terry's claim so that the injunction could be  
12 lifted. But wanted to discuss that with you. That was the  
13 purpose of that.

14 Q Okay. And I guess let me back up. One, let me kind of  
15 correct you on a technical point, which is Mr. Terry's claim  
16 isn't the only claim that's left outstanding. There were also  
17 law firm claims that were lodged as against Acis, correct?

18 A I believe there were two --

19 MR. MORRIS: Objection, Your Honor. Just relevance.  
20 I don't get it.

21 THE COURT: Okay. Sustained. You've gone seven  
22 minutes. So, three more minutes and we need to wrap it up.

23 MS. PATEL: Okay.

24 BY MS. PATEL:

25 Q Well, I guess, Ms. O'Neil, kind of in line with the email,

O'Neil - Cross

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1 the email came in shortly before Acis was sued by your co-  
2 counsel, Lynn Pinker, on behalf of the Charitable DAF and CLO  
3 HoldCo. Are you aware of this lawsuit?

4 A After it was filed. I was not aware of it before it was  
5 filed. The second one. I had seen the first one after it was  
6 filed. I had not seen the second one until after it was  
7 filed. We have a conflict with one of the defendants in that,  
8 so --

9 Q Okay. So, and when you say "the first one," are you  
10 talking about when it was originally the Charitable DAF versus  
11 U.S. Bank National Association and Moody's Investors Service?

12 A Yes.

13 Q Okay. And that all involved claims by the DAF brought  
14 against U.S. Bank and Moody's at the time relating to the Acis  
15 bankruptcy, right? It's claims that U.S. Bank didn't manage

16 --

17 A Ms. --

18 Q -- as a trustee correctly, correct?

19 A Ms. --

20 MR. MORRIS: Objection, Your Honor. She's got no  
21 foundation. She said she has a conflict and wasn't involved  
22 with this case.

23 THE COURT: Sustained.

24 THE WITNESS: That's correct.

25 BY MS. PATEL:

O'Neil - Cross

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1 Q Okay. I guess, Ms. O'Neil, let me just ask you: Did you  
2 have any involvement with -- if you look at Tab 27, that's a  
3 copy of the lawsuit, so that we're all clear exactly which one  
4 I'm asking you about. This is the lawsuit between the  
5 Charitable DAF and CLO HoldCo, your former client, versus U.S.  
6 Bank National Association, Moody's Investors Service, Acis  
7 Capital Management, Brigade, and Josh Terry. Did Foley have  
8 any involvement in the drafting or formulation of this  
9 lawsuit?

10 A None.

11 Q Okay.

12 MS. PATEL: No further questions, Your Honor.

13 THE COURT: All right. Any redirect?

14 MR. MORRIS: Very briefly.

15 THE COURT: Okay.

16 REDIRECT EXAMINATION

17 BY MR. MORRIS:

18 Q Ms. O'Neil, you've been representing a number of different  
19 entities associated with Highland since 2018, right?

20 A Correct.

21 Q And are those entities identified in Plaintiff's Exhibit  
22 #2 in the engagement letter?

23 A Plaintiff's 2 or -- sorry.

24 Q The Debtor's.

25 A The Debtor's 2. Okay. Let me switch. They are.

O'Neil - Redirect

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1 Q Okay. And since the Board has been appointed, have you  
2 met with board members to discuss the status of the matters  
3 that your firm has been handling?

4 A Yes.

5 Q And without disclosing attorney-client communications, did  
6 that involve providing a history of the work that you'd done?

7 A Yes.

8 Q Did that involve providing a history of the work that you  
9 expected to do in the future?

10 A Yes.

11 Q Did the Board have an opportunity to ask questions of you?

12 A Yes.

13 Q And did you, in fact, answer the Board's questions?

14 A I endeavored to do so to the best of my ability, yes.

15 Q Okay.

16 A Or I followed up if -- with information via email if I  
17 needed to get additional information.

18 Q And is it your understanding that the Board supports your  
19 retention for the purposes that were described earlier by Mr.  
20 Nelms?

21 A Yes.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: Any recross on that redirect?

25 MS. PATEL: No, Your Honor.

O'Neil - Redirect

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1 THE COURT: All right. Ms. O'Neil, you're excused.

2 THE WITNESS: Thank you.

3 (The witness steps down.)

4 THE COURT: All right. Highland, any more evidence?

5 MR. MORRIS: No, Your Honor. We rest.

6 THE COURT: All right. Is there any evidence from  
7 Acis?

8 MR. LAMBERSON: No, ma'am.

9 THE COURT: All right. Let's take a five-minute --  
10 please, five-minute break -- and then we'll hear your closing  
11 arguments.

12 THE CLERK: All rise.

13 (A recess ensued from 12:47 p.m. until 12:56 p.m.)

14 THE CLERK: All rise.

15 THE COURT: All right. Please be seated. We're  
16 going back on the record in Highland. I'll hear closing  
17 arguments.

18 I'm going to ask a question. I need clarification --

19 MR. DEMO: Of course.

20 THE COURT: -- on this. First off, in the Acis  
21 adversary that's stayed in the Acis bankruptcy case, Foley,  
22 it's proposed, would represent Highland. But is Foley also  
23 representing co-defendants in that adversary? You know, I  
24 think King & Spalding is representing all the co-defendants,  
25 or someone else is, but am I wrong or right about that?

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1 MR. DEMO: Yes and no, Your Honor. I think there's  
2 been some miscommunication on that. The adversary, as we  
3 understand it, is stayed, and because of that we are not  
4 seeking to represent -- or retain Foley in that adversary,  
5 although we will if that comes up again. So, in the  
6 adversary, pre-petition, Foley did represent the Debtor and  
7 then a handful of other creditors who were brought into that  
8 adversary, as we understand it, as defendants. On a go-  
9 forward basis, though, we are proposing to retain Foley on  
10 three things: General matters in the bankruptcy proceeding;  
11 the appellate --

12 THE COURT: General matters in the Acis bankruptcy  
13 proceeding?

14 MR. DEMO: Correct, Your Honor. The appeal involving  
15 the confirmation order. And the appeal involving the Neutra  
16 litigation. And --

17 THE COURT: Okay. On the appeal of the involuntary,  
18 --

19 MR. DEMO: Yes, ma'am.

20 THE COURT: -- only Neutra --

21 MR. DEMO: That is correct.

22 THE COURT: -- is an appellant. Okay. So what  
23 you're asking is for authority for Highland to pay the legal  
24 fees of Neutra on that?

25 MR. DEMO: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. DEMO: We are. And we, again, to the --

3 THE COURT: And let me -- let me -- and then the  
4 appeal of the confirmation order, are the appellants Highland  
5 and Neutra only, or is HCLOF an appellant?

6 MR. DEMO: In terms of Foley's representation, it's -  
7 -

8 THE COURT: No, no, no. Just answer the question.  
9 Who are the appellants in the confirmation order?

10 MR. DEMO: Highland, Neutra, and HCLOF.

11 THE COURT: Okay. Who is representing HCLOF?

12 MR. DEMO: King & Spalding.

13 THE COURT: Okay. And Foley has thus far been  
14 representing Neutra and Highland?

15 MR. DEMO: Correct, Your Honor.

16 THE COURT: Okay. Well, okay. You may proceed.

17 MR. DEMO: And I will be brief. And I think  
18 ultimately this, this is a relatively simple thing, and I  
19 think you've nailed it.

20 What are the benefits to the estate of -- because nobody  
21 has objected, again, to Foley representing the Debtor. What  
22 are the benefits to the estate for Foley representing Neutra  
23 and being paid for that by the Debtor? And to answer that  
24 question, I think you have to look to all the testimony that  
25 we've heard today, and you also have to look at who's



1 objecting, Your Honor. The Committee is not objecting. There  
2 is no other committee member objecting besides Acis. The only  
3 party objecting to Neutra -- or, I'm sorry, to Highland paying  
4 Neutra's fees in the appeal, which, again, are a portion of  
5 the \$500,000 that we think is going to be incurred post-  
6 petition on this, excluding today, because today has obviously  
7 gone a little bit long -- the only party objecting to paying a  
8 portion of that \$500,000 to have Foley represent Neutra in an  
9 appeal that is happening less than six weeks from now is Acis.

10 Acis is the party opponent in that. Acis is the party  
11 that stands to benefit, not just because the involuntary  
12 petition will not be overturned, but because there will be a  
13 lack of leverage and a lack of ability to contest their \$75  
14 million, which is where it started, but it keeps growing.  
15 It's at \$300 million now. The only party who's objected to  
16 that is Acis. None of the other creditors have objected.

17 THE COURT: Well, until the past 24 hours, the  
18 Committee was objecting.

19 MR. DEMO: Correct, Your Honor. And we had a --  
20 finally had a chance, with the new Board in place, to discuss  
21 it with the Committee. And the new Board explained to the  
22 Committee that, in their business judgment, spending this  
23 money, this \$500,000 -- which, again, is going to be allocated  
24 across these three matters; not all of it's going to be  
25 allocated to Neutra; a portion of it is going to be allocated

1 to Neutra -- \$500,000 for the possibility of a recovery to the  
2 estate, the possibility of the ability to challenge a \$300  
3 million proof of claim that impacts not just the estate but  
4 the other creditors in the estate, substantially, because  
5 there's only so much money here. So, --

6 THE COURT: Okay. Let me ask you to recap what the  
7 evidence was on benefit to Highland --

8 MR. DEMO: On benefit --

9 THE COURT: -- from the overturning of the order for  
10 relief in Acis.

11 MR. DEMO: In terms of the overturning of the order  
12 for relief in Acis, there were -- there was testimony on the  
13 possibility -- and again, it's a possibility, and we're not  
14 disputing that. Acis's attorneys said it was 10 percent.  
15 That's fine. Maybe it's 10 percent. There was evidence  
16 presented by Mr. Nelms on the possibility that if the Acis  
17 involuntary is overturned, that the contracts at issue, the  
18 advisory and the sub-management agreements, --

19 THE COURT: Well, let's take it sequentially, because  
20 you've got to, you know, look at benefit of the estate --

21 MR. DEMO: Understood.

22 THE COURT: -- versus time and cost, to some degree,  
23 right?

24 MR. DEMO: Right.

25 THE COURT: So, Neutra wins.

1 MR. DEMO: Okay.

2 THE COURT: Okay? That means, according to Mr.  
3 Lamberson's argument, which I think is the correct argument,  
4 that we send to arbitration whether it's appropriate for Acis  
5 to be in a bankruptcy.

6 MR. DEMO: Correct, Your Honor.

7 THE COURT: Okay.

8 MR. DEMO: Well, may be correct.

9 THE COURT: So, --

10 MR. DEMO: I think we did hear there's a different  
11 possibility from Mr. Nelms.

12 THE COURT: Well, what is the other possibility?

13 MR. DEMO: Well, okay. Understood, Your Honor.  
14 Okay.

15 THE COURT: Okay.

16 MR. DEMO: So, say we -- assuming we send it to  
17 arbitration, --

18 THE COURT: So that means an arbitration panel is  
19 convened, and at some point, many months from now, an  
20 arbitration panel will either say yes or no, involuntary, you  
21 know, should have gone forward.

22 MR. DEMO: Okay.

23 THE COURT: Okay? Let's say the arbitration panel  
24 says no, should not have gone forward. Then what does the  
25 world look like for Highland?

1 MR. DEMO: I guess, taking it a step back, Your  
2 Honor, assuming that this does go to arbitration, it also  
3 means that the involuntary petition was not entered. If the  
4 involuntary petition was not entered, which means that the  
5 Acis equity did not go to Mr. Terry, it stayed under Neutra,  
6 at that point --

7 THE COURT: Wait, wait, wait.

8 MR. DEMO: -- you also go into arbitration.

9 THE COURT: Wait, wait. Wait, wait. So you're  
10 saying that everything is wiped out in the involuntary, the  
11 Acis bankruptcy case?

12 MR. DEMO: Your Honor, and I do want to be really,  
13 honestly, very, very clear about this. I am -- I am not  
14 saying anything. I'm not -- trying very hard not to draw a  
15 legal conclusion. What I'm saying is that the Board has  
16 analyzed this, the Board has applied business --

17 THE COURT: But I'm trying to understand --

18 MR. DEMO: -- judgment to this, and that there is a -  
19 - there is a possibility. Now, --

20 THE COURT: I'm trying --

21 MR. DEMO: -- obviously, reasonable minds can --

22 THE COURT: Okay. Here's where I'm coming from. And  
23 you can tell me if I'm analyzing this incorrectly, in your  
24 view. Okay. We used to have this terrible Fifth Circuit case  
25 -- you know, God help me if this transcript gets sent -- but

1 called *Pro-Snax*. Okay?

2 MR. DEMO: Okay.

3 THE COURT: I think the Fifth Circuit has decided  
4 itself that it was terrible, so it's not going to come back to  
5 haunt me, saying that. So, *Pro-Snax* said basically the  
6 Bankruptcy Court is a Monday-morning quarterback in looking at  
7 the reasonableness of fees. You know, did it provide a  
8 benefit to the estate?

9 MR. DEMO: Uh-huh.

10 THE COURT: And then that got reversed a few years  
11 ago. I think it was the *Woerner* case -- *Baron & Newburger*  
12 (*Woerner*) -- where the Court said, no, you don't do a  
13 hindsight look. You look at, at the time fees were expensed,  
14 --

15 MR. DEMO: Uh-huh.

16 THE COURT: -- was there something like a reasonable  
17 possibility they would benefit the estate?

18 MR. DEMO: Yes.

19 THE COURT: Okay? So I'm looking through it in that  
20 lens, so to speak, and I'm like, what benefit to the Highland  
21 estate could there be if the confirmation -- well, if the  
22 order for relief is unwound or the confirmation order is  
23 unwound? And I'm not there. I'm not there understanding any  
24 benefit for Highland.

25 I can understand a benefit, maybe, for *Neutra*, although I

1 am even hard-pressed to see that, because it looks like years  
2 of more litigation.

3 MR. DEMO: And Your Honor, I mean, I do think that  
4 there was -- and again, I'm not going to challenge your legal  
5 conclusions -- I do think that there was evidence that in the  
6 Board's business judgment they did analyze this and they see  
7 it, I think, a little bit differently.

8 THE COURT: And I should defer heavily to a Board's  
9 reasonable exercise of business judgment. I've got trouble.  
10 So I'm just trying to --

11 MR. DEMO: Understood. And I think, when you look at  
12 that business judgment, --

13 THE COURT: Uh-huh.

14 MR. DEMO: -- you know, obviously, I don't disagree.  
15 I do think that when you have a three-person independent board  
16 of this caliber who's come into a difficult situation, has  
17 reviewed all of the evidence, talked to all the applicable  
18 people, when things happened with the DAF litigation that they  
19 didn't like, they took action to stop that. When they looked  
20 at the Winstead appeal and they said, you know, there's not a  
21 benefit to the estate here, let's drop they, they dropped it.

22 THE COURT: But again, work with --

23 MR. DEMO: When they --

24 THE COURT: Work with me. Fifth Circuit reverses the  
25 order for relief. I don't think you have disagreed with

1 Lamberson's argument that best-case scenario in that reversal  
2 scenario is that an arbitration panel now looks at, should  
3 this Acis -- you know, should it have gone forward in a  
4 bankruptcy?

5 MR. DEMO: Well, I guess, Your Honor, then maybe I --

6 THE COURT: So, in that many --

7 MR. DEMO: -- I'm not being clear.

8 THE COURT: -- months, let's say eight months that an  
9 arbitration panel takes to decide, what happens during that  
10 eight months?

11 MR. DEMO: Well, then I guess, Your Honor, I need to  
12 step back, because I have not -- absolutely not been clear.  
13 If it goes to an arbitration panel, our view -- and I think  
14 Ms. O'Neil's briefs to the Fifth Circuit are clear on this --  
15 the arbitration panel is going to arbitrate whether  
16 or not there was a fraudulent conveyance. It's going to  
17 arbitrate how to resolve the claims. It's not going to  
18 arbitrate whether or not the involuntary petition should ever  
19 have been entered.

20 THE COURT: Wait, wait. What does that mean? Of  
21 course. That's the starting point of it all, right? The  
22 appeal is the Bankruptcy Court wrongly held a trial on the  
23 involuntary petition and ordered for relief. It should have  
24 deferred to an arbitration panel to do that. Isn't that  
25 appeal number one that we're talking about?

1 MR. DEMO: Yes, but --

2 THE COURT: Neutra's appeal?

3 MR. DEMO: Yes, it is.

4 THE COURT: Okay.

5 MR. DEMO: But I do think there's a nuance. And I do  
6 want to defer to the pleadings that were filed with the Fifth  
7 Circuit, because I don't want here to get myself out in front  
8 of that Fifth Circuit appeal, because obviously I do very much  
9 want that appeal to go forward. And maybe we lose and maybe  
10 we win, but if we win, I think the --

11 THE COURT: If Neutra wins.

12 MR. DEMO: If Neutra wins, one of the outcomes -- and  
13 again, I understand that, you know, reasonable minds can  
14 differ that there --

15 THE COURT: Okay.

16 MR. DEMO: -- of the outcomes.

17 THE COURT: But one of the outcomes.

18 MR. DEMO: One of the outcomes is that the  
19 involuntary petition is unwound, withdrawn, and the parties go  
20 to arbitration on the claims. If that were to happen, --

21 THE COURT: Wait. It's unwound and they go to  
22 arbitration on what claims? The claims in the adversary  
23 proceeding that's been filed in Acis?

24 MR. DEMO: Again, Your Honor, I'm not the appellate  
25 lawyer here. I mean, this is why we are here.



1 THE COURT: But how do you skip over the arbitration  
2 of the order for relief? Because if Joshua Terry, who  
3 commenced it, you know, he has the right now to argue to an  
4 arbitration panel that this should have been in bankruptcy,  
5 right? He doesn't have to just agree that the adversary  
6 proceeding is now arbitrated. Right?

7 MR. DEMO: Well, again, Your Honor, I don't want to  
8 substitute my judgment for the judgment of the Board. I think  
9 the judgment of the Board is that there is a scenario and that  
10 it's worth exploring and that it's worth the -- what we  
11 honestly think is a limited amount of money to explore.  
12 Because I think, if we explore that, we explore the  
13 possibility, quite honestly, of taking it out of bankruptcy,  
14 then, yes, in that scenario, and which we do it think is  
15 possible, in that scenario, and call it whatever probability  
16 you want, but if you're going to spend half a million dollars  
17 to get to a scenario that could reap you -- and I don't want  
18 to put a number on it -- but millions of dollars in future  
19 revenue, millions of dollars in terms of --

20 THE COURT: You're melding. You're collapsing. And  
21 we all know as lawyers that's not how it works. Things happen  
22 sequentially, okay?

23 MR. DEMO: Okay. Then I guess, going --

24 THE COURT: There's a setting aside -- well, there's  
25 a reversal of the Bankruptcy Court's issuance of an order for

1 relief.

2 MR. DEMO: Okay.

3 THE COURT: And that means you should have deferred  
4 to an arbitration panel, Judge Jernigan. And so they remand  
5 so that I can, consistent with that appellate ruling, say,  
6 We're staying the bankruptcy and it's going to arbitration to  
7 decide whether an order for relief. Is there really any  
8 realistic scenario where we skip that step?

9 MR. DEMO: We think that there's a scenario that is  
10 worth exploring.

11 THE COURT: I feel like your colleagues are really  
12 dying to chime in because they think they've got the answer to  
13 my question, no offense to you.

14 MR. MORRIS: I really -- I don't, Your Honor, but if  
15 I may.

16 THE COURT: Uh-huh.

17 MR. MORRIS: I think Ms. O'Neil is the appellate  
18 lawyer. Maybe she should speak on this very precise point, --

19 THE COURT: Okay. Because --

20 MR. MORRIS: -- if that's okay with the Court.

21 THE COURT: Because I see many miles --

22 MR. MORRIS: Yeah.

23 THE COURT: -- to go before we sleep if there's a  
24 reversal, and I'm trying to figure -- well, you know, we all  
25 know that, right?

1 MS. O'NEIL: Your Honor, if I may.

2 THE COURT: Uh-huh.

3 MS. O'NEIL: And I did not want to interrupt Mr.  
4 Demo, and he's done a great job, but obviously we've been  
5 involved with the appeal.

6 THE COURT: Right.

7 MS. O'NEIL: We've prepared the briefs.

8 THE COURT: So how does it play out if there's a  
9 reversal in favor of Neutra --

10 MS. O'NEIL: If I may, Your Honor.

11 THE COURT: -- of the order for relief?

12 MS. O'NEIL: The issue on the appeal is not to send  
13 the concept to arbitration of the involuntary petitions.

14 THE COURT: Okay.

15 MS. O'NEIL: It is that Mr. Terry was not a qualified  
16 petitioner because he was bound by an arbitration, a binding  
17 arbitration agreement, and that the issue that he -- by  
18 proceeding with these involuntary petitions, he commenced a  
19 suit, a proceeding that was, at its core, about fraudulent  
20 transfers, and that that should have gone to arbitration. And  
21 to proceed and try to engage this Court's jurisdiction on  
22 something that he had contractually agreed to go to  
23 arbitration on was improper.

24 So, if Neutra wins on that argument, and I would encourage  
25 the Court, we -- I think the briefs are in one of the

1 exhibits, but certainly I would provide them to the Court  
2 before the Court makes a determination if it would help. If  
3 there -- if Neutra wins on that appeal, then our position  
4 would be that yes, the bankruptcy is effectively void *ab*  
5 *initio*, and that's what we believe the case law supports.

6 Where that would put the parties, potentially -- and  
7 again, we're speculating what the Fifth Circuit may or may not  
8 due to instruct this Court to do -- could reverse and render,  
9 as it were, as Mr. Nelms testified happened to him previously,  
10 but could instruct this Court to abstain, which I think was --  
11 and that is one of the various motions and the orders that the  
12 Court had denied. All of these are wrapped up in the appeal,  
13 Your Honor. And in doing so, instruct the petitioner, Mr.  
14 Terry, and Acis to go arbitrate the issue of the fraudulent  
15 transfers. That would reinstate Acis. Acis could reinstate  
16 Highland as the manager of the CLOs.

17 THE COURT: So every single order in the Acis case  
18 would be null and void?

19 MS. O'NEIL: We believe that the case law is that it  
20 would be void *ab initio*. And now, Your Honor, practically  
21 speaking, --

22 THE COURT: Void *ab initio*? Okay. That could only  
23 -- is that hinged to a subject matter jurisdiction, lack of  
24 subject matter jurisdiction --

25 MS. O'NEIL: Partially, that's part of the argument.

1 THE COURT: -- theory?

2 MS. O'NEIL: That's part of the argument. Yes, Your  
3 Honor.

4 THE COURT: Okay.

5 MS. O'NEIL: Practically speaking, it is our belief,  
6 although it is not clear, is what I've tried to kind of convey  
7 to the Court, and in conjunction with this conversation I was  
8 trying to have with Mr. Terry's counsel/Acis's counsel, is  
9 that we believe Mr. Terry has been paid down. Practically  
10 speaking, if that happens and he's only left with a claim or  
11 currently has a claim of \$4 million, \$4-1/2 million, which is  
12 what we think it is, or it's somewhere in that neighborhood,  
13 that -- and there's sufficient cash in Acis to pay that claim  
14 off -- it is a claim Judge -- Mr. Nelms testified to the fact  
15 that it would need to be paid -- then there may not even need  
16 to be a fraudulent transfer lawsuit because the claim would --  
17 what's left of the claim would just be paid off. And then  
18 Acis -- Neutra would be back in ownership of Acis, Acis would  
19 engage Highland to come back in and do what it was doing  
20 before, Mr. Terry got his claim paid off, and there we are.

21 THE COURT: Okay.

22 MR. DEMO: That's honestly pretty much it, Your  
23 Honor. And we think that -- and the Board thinks that the  
24 benefit of pursuing that is worth it, quite honestly. And  
25 they think, in their business judgment, that it's worth paying

1 those Neutra fees -- which again, are a portion of the  
2 \$500,000, only a portion -- because that benefit accrues to  
3 the estate, or could accrue to the estate in a situation  
4 where, in their business judgment, it's worth going forward on  
5 this.

6 THE COURT: Okay. The appeal -- okay. Let me make  
7 sure I heard this correctly. The appeal of the confirmation  
8 order, whereas we have Neutra only on the appeal --

9 MR. DEMO: Correct.

10 THE COURT: -- of the order for relief, the appeal of  
11 the confirmation order is Highland, Neutra, and HCLOF.

12 MR. DEMO: Correct.

13 THE COURT: And King & Spalding still represents  
14 HCLOF in connection with that appeal.

15 MR. DEMO: Correct. And they're the only law firm  
16 representing HCLOF in that appeal.

17 THE COURT: So here's what I'm struggling with. You  
18 know, what initially seemed like kind of a compelling argument  
19 -- all the briefing has been done, oral argument is set in  
20 March -- it feels like to me the main beneficiaries of a  
21 reversal of that confirmation order are HCLOF and Neutra.  
22 Foley can represent Neutra. Neutra can pay. King & Spalding  
23 can represent HCLOF. HCLOF can pay. And that seems like the  
24 reasonable scenario to me.

25 MR. DEMO: And I hear that. But I think -- and I

1 think Mr. Nelms --

2 THE COURT: Because let's --

3 MR. DEMO: -- testified to it, but --

4 THE COURT: Work with me. Let's say they don't  
5 reverse the order for relief --

6 MR. DEMO: Okay.

7 THE COURT: -- but they do reverse the confirmation  
8 order.

9 MR. DEMO: Okay.

10 THE COURT: So, Chapter 11 Trustee is in place  
11 representing Highland, and he can -- I'm sorry -- he is the  
12 spokesperson for the Acis, the controller of the Acis estate.  
13 He might go forward with plan number four, five, whatever it  
14 would be.

15 MR. DEMO: Okay.

16 THE COURT: Or say, I think it's time to convert this  
17 to 7. I mean I'm just trying to figure out --

18 MR. DEMO: And I guess I do want to go back to one  
19 thing, --

20 THE COURT: Uh-huh.

21 MR. DEMO: -- because I do not think there is another  
22 economic beneficiary that would pay Neutra's fees. I think if  
23 the Debtor is not allowed to pay Neutra's fees, nobody will  
24 pay Neutra's fees, and that portion of the appellate argument  
25 will fall by the wayside. Because --

1 THE COURT: So Neutra loses, but I don't see how  
2 Highland loses. You have not painted a scenario where it's  
3 clear to me there's any economic benefit to the estate.

4 MR. DEMO: I would, I would, with all --

5 THE COURT: And you're telling me, Defer to the  
6 Board's business judgment. But I'm --

7 MR. DEMO: Well, I --

8 THE COURT: I'm concerned that the evidence hasn't  
9 shown me --

10 MR. DEMO: I would also ask, Your Honor, --

11 THE COURT: -- all of the --

12 MR. DEMO: -- in all --

13 THE COURT: -- scenarios that lead to their  
14 reasonable business judgment on this.

15 MR. DEMO: As Ms. O'Neil just said, I mean, this is  
16 above the Fifth -- to the Fifth Circuit. The Fifth Circuit is  
17 set to hear this in six weeks. And if the Fifth Circuit rules  
18 the way that Ms. O'Neil just said, I do think, and I think the  
19 Board thinks -- actually, I know the Board thinks -- that  
20 there is a tangible benefit to the estate here. And so I know  
21 that I'm asking you to defer to their judgment, --

22 THE COURT: All I heard was --

23 MR. DEMO: -- but I'm also asking just for --

24 THE COURT: -- that they'd reinstate the sub-advisory  
25 and shared services agreements.



1 MR. DEMO: Which are --

2 THE COURT: Which, by the way, Highland moved to  
3 terminate, moved to compel rejection at one point during the  
4 case, and then, when that didn't work, HCLOF started calling  
5 for redemption.

6 MR. DEMO: And it's not the --

7 THE COURT: This is nuts for me --

8 MR. DEMO: It's not -- it's not the -- Your Honor,  
9 it's --

10 THE COURT: Tell me why it's not nuts for me to think  
11 --

12 MR. DEMO: Because it's not the same Highland.

13 THE COURT: -- that Highland would be thrilled to  
14 have Acis back managing the CLOs and subcontracting with  
15 Highland. I mean, that --

16 MR. DEMO: It's not, it's not the same Highland. The  
17 stuff that happened prior to the institution of the Board was  
18 the stuff that happened prior to the institution of the Board.  
19 There is new management of Highland. That new management is  
20 working very hard. As you've seen, Your Honor, that new  
21 management is willing to push back. That new management, with  
22 the DAF, which you've heard testimony of, that new management  
23 is working to get that motion withdrawn. That new management  
24 is not going forward with Lynn Pinker because of actions that  
25 it took that it thought subverted their control and their

1 management of the Debtor. The new management decided to drop  
2 an appeal that they did not think had any merit.

3 It's not the same Debtor, Your Honor. It is a board  
4 consisting of three highly-qualified people who are exercising  
5 their own judgment. So all of that stuff that happened prior  
6 to January 9th, I don't want to say hey, it's a clear line in  
7 the sand, but it is. Mr. Dondero is not in control of  
8 Highland Capital Management.

9 THE COURT: But he is in control of Neutra.

10 MR. DEMO: He is the economic beneficiary of Neutra.  
11 That is correct. But Mr. Dondero did tell Mr. Nelms, as Mr.  
12 Nelms testified, that he would reinstate those contracts. And  
13 I understand that. But again, as you've seen, Mr. Nelms and  
14 the Board have been able to push back, have been able to exert  
15 control, to exert influence, and to exert management over an  
16 institution that is very difficult to manage.

17 And I do think that deference to that is something that  
18 should very much be considered, because it's very easy to  
19 think of this as Old Highland, but this is New Highland, who  
20 has done an independent, objective review of these claims, who  
21 has sat with Ms. O'Neil, who has sat with Pachulski, who has  
22 sat with Mr. Terry and Ms. Patel and talked about this stuff,  
23 and still thinks that there is a benefit here to the estate,  
24 and that spending the \$500,000 to pursue that benefit, which  
25 is not just a benefit to Highland but it's a benefit to

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1 Highland other -- to Highland's other creditors, I guess, Your  
2 Honor, quite honestly, I would ask that you to defer to that  
3 new management, because it is not -- it is not Old Highland.

4 All that stuff that people have talked about -- I mean,  
5 you've seen today in court, you've heard testimony about very  
6 qualified people working to stop that and working to put this  
7 estate into a position where it can reorganize, where it can  
8 come to agreements with its creditors, where it can work  
9 through this process, where it can come out the other side.

10 But if we take away that Board's ability to manage  
11 litigation with one of their biggest creditors, whose  
12 litigation claim keeps growing, all you're doing is  
13 benefitting that one creditor, not to the detriment of Mr.  
14 Dondero but to the detriment of the other creditors in this  
15 case.

16 UBS has a claim. Redeemer has a claim. Meta-e has a  
17 claim. McKool's has a claim. You can run through that whole  
18 list. And if you take away the Board's right to direct  
19 litigation that is going directly to the Board's ability to  
20 control runaway claims, to negotiate with creditors, and to  
21 come up with an idea of how to split the pie, then, with all  
22 respect, Your Honor, you are infringing on that Board's  
23 business judgment and that Board's ability to reorganize this  
24 case.

25 This case isn't just about --

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1 THE COURT: It wouldn't be taking away. And here is  
2 a nuance that -- I think it is perfectly reasonable, in case  
3 you don't know where I'm heading on this, for Foley to  
4 represent Highland in the Acis case, in that adversary  
5 proceeding, if it goes forward, because heck yeah, Highland  
6 has been sued for huge amounts of money.

7 MR. DEMO: Understood.

8 THE COURT: Their claim, that is many millions, has  
9 been objected to. So, heck yeah, this estate needs good  
10 representation of Highland in that case, where there are many  
11 unresolved issues still in the Acis case.

12 But on the appeal, I am just still lost as to how there is  
13 any chance in the world Highland benefits in those appeals.  
14 Neutra, heck yeah. Maybe they get their Acis back and can  
15 instruct it to, you know, stop suing Highland or whatever.  
16 Dondero controlling Neutra can do that. Okay? And HCLOF, it  
17 doesn't want Acis to have anything to do anymore with managing  
18 its equity piece of those CLOs. Sure. But how -- I mean,  
19 you're telling me that there could be a scenario -- here's  
20 what I'm hearing. That there is a benefit in having all those  
21 fraudulent transfer claims arbitrated, I guess, not litigated  
22 in the Bankruptcy or District Court, and there's a benefit in  
23 having all of the management agreements, portfolio management  
24 agreements reinstated. And I just, I don't see how that  
25 happens anytime soon based on how I perceive a reversal of

1 orders on appeal happening.

2 MR. DEMO: And I guess I don't know what else to say  
3 on that point. We do think there's a \$12 million tangible  
4 benefit to reinstating those contracts. We think there's a  
5 tangible benefit to allowing Neutra to go forward with its  
6 appeal. And again, there is nobody else who I think would pay  
7 that freight besides the Debtor, because that benefit, we  
8 believe, goes to the Debtor.

9 THE COURT: How many years of life are there left on  
10 the CLOs that Acis manages?

11 MR. DEMO: I would have to check, Your Honor. I  
12 don't know off the top of my head. I can ask. But --

13 THE COURT: I mean, you're saying \$12 million. I  
14 mean, I don't --

15 MR. DEMO: I, you know, --

16 THE COURT: There's not a -- I'm just not sure where  
17 that number is coming from. I never heard direct evidence of  
18 that.

19 MR. DEMO: Okay. Well, I guess, Your Honor, I mean,  
20 again, I would just ask that you defer to the business  
21 judgment of the Board and allow them to position this  
22 litigation in a way that best enables them to deal with every  
23 creditor's claim, and not just the claims of one creditor.  
24 And if they cannot fight the claims of the creditor, then they  
25 can't negotiate how that pot is going to be split in a fashion

1 that benefits everybody.

2 So I guess, Your Honor, I mean, I don't know what else to  
3 say about the benefits of the Neutra appeal except that the  
4 testimony, I think, speaks for itself. But, you know, I --  
5 and in terms of --

6 THE COURT: Again, fight the claim of a creditor.  
7 Foley can represent Highland in the adversary proceeding,  
8 wherever that goes forward.

9 MR. DEMO: Yeah.

10 THE COURT: Probably District Court, not this Court.  
11 At least some of it, if not all of it. But anyway, I'm  
12 digressing. They can object to Acis's proof of claim. They  
13 can object to Terry's proof of claim. I mean, --

14 MR. DEMO: And conversely, Your Honor, if -- if --

15 THE COURT: -- this has nothing to do with -- I mean,  
16 I don't get the appeal. I mean, I --

17 MR. DEMO: Right.

18 THE COURT: Neutra can appeal, HCLOF can appeal, but  
19 I'm not seeing the benefit to Highland.

20 MR. DEMO: And I guess the only thing I would say,  
21 Your Honor, is if there is an improper benefit, we are not  
22 saying that the fee applications are sacrosanct. People can  
23 challenge the improper benefit there.

24 And again, the settlement gave broad discretion to the  
25 Committee to pursue insider claims. So if an insider is

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1 receiving a benefit from this, the Committee has standing to  
2 pursue that.

3 So it's not a null set, Your Honor, whereas cutting off  
4 the appeal now does take away that possibility.

5 THE COURT: How would I be cutting off the appeal?  
6 I'm not cutting off the appeal. King & Spalding can go in  
7 there and fight hard. Foley can go in there and fight hard  
8 for Neutra. So, --

9 MR. DEMO: One second, Your Honor.

10 (Counsel confer.)

11 MR. DEMO: And I guess, you know, Your Honor, and I  
12 do want to reiterate that there is no other party with an  
13 economic incentive to fight the Neutra appeal the way that the  
14 Debtor has an economic incentive.

15 THE COURT: That makes no sense to me. HCLOF is the  
16 one who hated this injunction.

17 MR. DEMO: That's not the Neutra appeal, Your Honor.  
18 That's the confirmation order.

19 THE COURT: Well, okay. Neutra gets its company back  
20 if they win.

21 MR. DEMO: And we would get our contracts back.

22 THE COURT: And arguably, it can control Acis, maybe,  
23 okay, and it can assign management contracts to whoever it  
24 wants. That just -- and it says it'll assign them to  
25 Highland. If you can trust Jim Dondero, then Highland's going

1 to benefit if Neutra wins that appeal. Right?

2 MR. DEMO: Yes. Yes, Your Honor.

3 THE COURT: Okay. So that --

4 MR. DEMO: Highland would benefit greatly --

5 THE COURT: Okay.

6 MR. DEMO: -- if Neutra were to win that appeal.

7 THE COURT: Okay. Okay. Well, but first Neutra  
8 benefits, right? And then --

9 MR. DEMO: No.

10 THE COURT: -- Highland only secondarily benefits --

11 MR. DEMO: I -- I --

12 THE COURT: -- if Jim Dondero keeps his word and  
13 gives the management contracts back to Highland.

14 MR. DEMO: Jim Dondero would also have to repay the  
15 \$8 million in claim, even if he didn't reinstate those  
16 contracts. And that \$8 million would be hundred-cent dollars.

17 THE COURT: Okay.

18 MR. DEMO: So, worst case, --

19 THE COURT: It would have been nice to have him  
20 testify as to all of this.

21 MR. DEMO: Worst --

22 THE COURT: It would be more compelling if I had him.

23 MR. DEMO: Well, --

24 THE COURT: Okay? But I don't think --

25 MR. DEMO: -- I can only do so much, Your Honor.



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1 THE COURT: -- that's going to happen anytime soon.

2 MR. DEMO: But I guess worst-case scenario is that  
3 it's \$8 million in hundred-cent dollars.

4 THE COURT: Okay.

5 MR. DEMO: And that's not nothing for \$500,000. And  
6 only a portion of that \$500,000.

7 THE COURT: Okay.

8 MR. DEMO: Thank you, Your Honor.

9 THE COURT: Okay. Mr. Lamberson?

10 MR. LAMBERSON: Your Honor, do you want a closing  
11 from me? Or no?

12 THE COURT: I don't really need it. Thank you.

13 MR. LAMBERSON: Okay.

14 THE COURT: Okay.

15 MR. LAMBERSON: Because I know your hearing starts in  
16 about two minutes.

17 THE COURT: All right. So, I just hate it that we  
18 spent so much time on this. I hate it that we spent so much  
19 time, but, I mean, I understand. I understand. You know, I  
20 think the employment application was filed pretty early in the  
21 case, right, and -- October 29th. And it was continued,  
22 continued, continued, because we were getting objections from  
23 the Committee, or they wanted time to look at it, I guess.  
24 And now you're kind of up against the wire, right, because  
25 oral arguments are set at the Fifth Circuit next month. So I,

1 you know, I hate it that we were here, but I understand it.

2 But I'm concerned. I'm concerned -- well, here's the  
3 deal. We have a great board, and I totally get that  
4 Bankruptcy Courts should defer heavily to the reasonable  
5 exercise of business judgment by a board. And we've got great  
6 professionals. And we've got this case, I think, on a good  
7 track as a general matter now. But I'm concerned that Dondero  
8 or certain in-house counsel has -- you know, they're smart,  
9 they're persuasive -- that -- what are the words I want to  
10 look for -- they have exercised their powers of persuasion or  
11 whatever to make the Board and the professionals think that  
12 there is some valid prospect of benefit to Highland with these  
13 appeals, when it's really all about Neutra, HCLOF, and Mr.  
14 Dondero. That's what I believe.

15 I mean, this is awkward, right, because you want to defer  
16 to the debtor-in-possession, but I have this long history, and  
17 I can think through the scenarios. If this is reversed, here  
18 is how it will play out. If this is reversed, here is how it  
19 might play out. And I know, you know, there are multiple ways  
20 it might play out, but I cannot believe there is a chance in  
21 the world there is economic benefit to Highland if these  
22 things get reversed. Economic benefit to Neutra: Yeah,  
23 maybe. Economic benefit to HCLOF: Well, they'll get what  
24 they want. You know, whether it's an economic benefit, I  
25 don't know. But benefit to Highland? I just don't think the

1 evidence has been there to convince me it's reasonable  
2 business judgment for Highland to pay the legal fees  
3 associated with the appeal.

4 And even more concerning to me is a valid point was made  
5 that Highland is in bankruptcy because of litigation,  
6 litigation, litigation. The past officers and directors and  
7 controls' propensity to fight about everything. This isn't a  
8 balance sheet restructuring, okay? It's not a Chapter 11  
9 caused by operational problems or revenue disruption or who  
10 knows what kind of disruption. It's about years of litigation  
11 finally coming home to roost. And this just appears to be  
12 more of the same, potentially.

13 Okay. Parties have a right to appeal. I respect that.  
14 Neutra, go for it. HCLOF, go for it. But this estate and its  
15 creditors should not bear the burden of having Highland pay  
16 for that, when, again, I don't think there's any evidence to  
17 suggest they could benefit at the end of the day.

18 So what I'm going to do is I'm going to approve the  
19 retention of Foley to represent Highland in the Acis case. We  
20 all know the adversary is stayed right now. It may or may not  
21 ever be un-stayed, depending on what strategies people want to  
22 pursue. But Highland, I think a meritorious case has been  
23 presented, and under 327(e) I will approve Foley representing  
24 Highland in all Acis matters. Okay? The Acis bankruptcy  
25 case. The adversary proceeding, if it goes forward. And so

1 that's my ruling.

2 I will additionally rule, for the avoidance of doubt, that  
3 if Foley wants to represent Neutra in the appeals and get paid  
4 by Neutra, I don't have any problem with that. In other  
5 words, I'm not going to find something like there's a conflict  
6 with the estate, you know, because of its simultaneous  
7 representation of Neutra. That's fine. But I'm not going to  
8 approve Highland paying anything in connection with either of  
9 those appeals. So that is the ruling of the Court.

10 Have I left any gaps here?

11 MR. DEMO: Your Honor, just one clarification.

12 THE COURT: Uh-huh.

13 MR. DEMO: Foley is representing Highland Capital  
14 Management in the appeal of the confirmation order to the  
15 Fifth Circuit. I just want to clarify that your ruling that  
16 Highland can represent -- I'm sorry -- Foley can represent  
17 Highland in all Acis matters extends to their representation  
18 of Highland Capital Management in the appeal of the  
19 confirmation order that's set for March 30th.

20 THE COURT: Okay. Let me think through that.

21 MR. DEMO: And again, Your Honor, there's been no  
22 objection to that.

23 THE COURT: King & Spalding is in there representing  
24 HCLOF. Foley would be representing both Neutra and Highland  
25 in connection with the confirmation order?

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1 MR. DEMO: Technically, but Neutra really has  
2 nothing. It's a coattail party in that case. Highland  
3 Capital Management, to the extent that they could bifurcate  
4 Neutra, it would still be doing the exact same work. So if  
5 there is an issue there with the representation of Neutra,  
6 we'd still ask that Foley be allowed to represent Highland  
7 Capital Management in that appeal.

8 THE COURT: Okay. So you're telling me Neutra  
9 doesn't really benefit from that appeal, so you want Highland  
10 to pay all of the fees of Foley in connection with the  
11 confirmation order appeal?

12 MR. DEMO: All I'm asking, Your Honor, is that Foley  
13 can represent Highland Capital Management in that appeal. And  
14 again, there's been no objection to that. What happens with  
15 Neutra, I, you know, I understand your position. I am simply  
16 asking for a clarification that Foley can continue  
17 representing the Debtor in the Debtor's appeal of the  
18 confirmation order.

19 THE COURT: All right. I will say yes to that, but  
20 they need to be prepared to have their fees split. I'm not  
21 saying 50/50, I don't know what the percentage is, but they  
22 are going to be allocated between Neutra and Highland, and  
23 they should not expect to get a hundred percent of those  
24 covered by Highland at the end of the day. Okay? There's  
25 going to be a deep dive into looking at how that allocation

1 should work, okay?

2 MR. DEMO: And they will be filing fee apps,  
3 obviously, on all of the matters that they are --

4 THE COURT: Okay. Anything else?

5 MR. POMERANTZ: One moment, Your Honor.

6 THE COURT: Okay.

7 (Pause.)

8 MR. DEMO: Yeah. And Your Honor, I do just want to  
9 clarify that when we talk about the involuntary petition  
10 appeal, that when we talk about its effect on the fraudulent  
11 conveyance action, to the extent that -- and I would like to  
12 clarify your position on this, Your Honor. Is your position  
13 that the appeal of the involuntary, if successful, would have  
14 no impact on the fraudulent conveyance actions in the Acis  
15 litigation?

16 Because I do think that it is clear that --

17 THE COURT: I think we don't know. We would have to  
18 see --

19 MR. DEMO: And I guess that's -- that's --

20 THE COURT: -- what the Fifth Circuit states.

21 MR. DEMO: And my --

22 THE COURT: And it may be: Bankruptcy Court, stay  
23 the proceedings and defer, send it to arbitration. "It" being  
24 re-litigation of --

25 MR. DEMO: Understood.

1 THE COURT: -- the involuntary.

2 MR. DEMO: And --

3 THE COURT: That may be, to me, a likely scenario,  
4 but maybe not.

5 MR. DEMO: And -- and --

6 THE COURT: Maybe they'll say something else.

7 MR. DEMO: Understood. And I think we're honestly on  
8 the same page with that.

9 THE COURT: Uh-huh.

10 MR. DEMO: Because to the extent that it does put it  
11 into arbitration, to the extent that there is that  
12 possibility, that it changes the color of those fraudulent  
13 conveyance claims, changes the color of Acis's \$300 million  
14 proof of claim, which goes to settlement strategy, which goes  
15 to the benefits to other creditors, which goes to a whole  
16 panoply of other things that tie into a benefit to the estate.  
17 And I don't want to re-argue what we've already argued, but I  
18 think, as Your Honor said, that chance that there is going to  
19 be a change to the fraudulent conveyance, either because it  
20 throws them into an arbitration or because it somehow  
21 otherwise colors it, is, in and of itself, a substantial  
22 benefit to the estate -- leaving aside the dollars from the  
23 contracts, leaving aside the \$8 million proof of claim --  
24 because that benefit goes to, again, that \$300 million proof  
25 of claim that Acis has filed, which impacts the estate, which

1 impacts other creditors, and which impacts the settlement  
2 mechanics in this case.

3 So to the extent that there is a chance that the  
4 involuntary changes that and recolors it, there is a  
5 substantial benefit to the estate in that, because it allows  
6 the estate to work with creditors --

7 THE COURT: I mean, --

8 MR. DEMO: -- to figure out a way to settle claims in  
9 a way that are --

10 THE COURT: I get what you're saying, but guess what?  
11 You can object to that \$300 million proof of claim. And we  
12 might have a very interesting conversation about --

13 MR. DEMO: What --

14 THE COURT: Well, it's the same judge either way, but  
15 -- well, I guess I don't get what you're saying. You have the  
16 ability to object to the proof of claim whether there's  
17 affirmance or --

18 MR. DEMO: Yeah. But --

19 THE COURT: -- reversal, right? I'm just --

20 MR. DEMO: We don't have a -- you know, we may not  
21 have to get -- I'm sorry, Your Honor, and I'll stop it -- but  
22 we may not have to get there. Objecting to the proof of claim  
23 is quali... it is quantitatively and qualitatively different  
24 than a Fifth Circuit order saying that there are changes to  
25 the fraudulent conveyance, there are changes to the



1 distribution of equity under the plan. Maybe there is no plan  
2 -- or maybe there is no bankruptcy at all.

3 Those things fundamentally change the dynamics of this  
4 case in a way that's good for the estate. And those things  
5 can only happen if there's an order from the Fifth Circuit  
6 entering that. We can object all down the pipe, and we are  
7 going to object, Your Honor, and I assume other people will  
8 object as well. But our objecting does not have the same  
9 benefit to the estate as a Fifth Circuit opinion saying,  
10 Fraudulent conveyance claims go to arbitration; saying, There  
11 is no involuntary petition.

12 Now, I understand that there are questions as to the  
13 probability of those things, but the fact that there is a  
14 probability of those things happening and the cost to the  
15 estate is a hundred thousand dollars, I understand what Your  
16 Honor has said and I don't want to overstay my welcome, but I  
17 do think we are -- at least maybe I am presenting it wrong --  
18 but that Fifth Circuit order either way is going to calcify  
19 and solidify this in ways that are beneficial to the estate  
20 and beneficial to how this bankruptcy is going to progress.

21 THE COURT: Okay. I understand you feel passionately  
22 about that, but just so you know, for future purposes or not,  
23 I'm not there because, you know, among other things, we -- you  
24 know, life has changed. You know, if the Fifth Circuit says  
25 reversal, not a darn thing should happen in a bankruptcy case

1 of Acis, you know, it can all go to arbitration, well, that's  
2 the Acis litigation, right? But Acis has filed a proof of  
3 claim now. And are you going to tell me the Fifth Circuit is  
4 going to say the arbitration that should have happened in the  
5 earlier Acis case trumps, if you will, adjudication of a proof  
6 of claim now in a new case?

7 MR. DEMO: And the claims are --

8 THE COURT: I mean, I'm just -- someone mentioned  
9 *Gandy* and *National Gypsum*, and there's even a more recent  
10 Fifth Circuit case dealing with arbitration which --

11 MR. DEMO: The claims, Your Honor, are state law  
12 claims if there's no bankruptcy, and I think --

13 THE COURT: But there is a bankruptcy. There's a  
14 Highland bankruptcy now. And there's a proof of claim --

15 MR. DEMO: Not if the Fifth Circuit --

16 THE COURT: -- in the Highland case.

17 MR. DEMO: -- overturns the involuntary petition.

18 THE COURT: Yeah. I just -- okay. We're just, we're  
19 having academic conversations, and I'm probably guilty for  
20 going down this trail. So, anyway, is there anything further,  
21 then?

22 MR. LAMBERSON: No, Your Honor.

23 THE COURT: I need a few orders.

24 MR. LAMBERSON: If they want to prepare an order and  
25 send it to us, we're happy to look --

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1 THE COURT: Okay. Thank you all.

2 (Proceedings concluded at 1:44 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 /s/ Kathy Rehling

02/20/2020

24

25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

Date

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